Supreme Court, U.S.
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No. 93-390

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

THE YOUGHIOGHENY AND OHIO COAL COMPANY,
Petitioner,

v.

WAYNE N. MCANGUES,

and

DIRECTOR,
OFFICE OF WORKERS' COMPENSATION PROGRAMS,

and

THE BENEFITS REVIEW BOARD,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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THE QUESTIONS PRESENTED

Are the various standards set by the Courts of Appeals to determine whether total disability arises "in whole or in part out of coal mine employment" under the Federal Black Lung Acts conflicting, so as to require plenary review by this Court to resolve the issue with one national standard?

May the Black Lung Acts be applied in such a manner that evidence that the claimant was totally disabled as a result of an auto accident wholly unrelated to pneumoconiosis is ignored as irrelevant in determining whether to award benefits?

PARTIES TO THE PROCEEDINGS

The Petitioner is The Youghiogheny and Ohio Coal Company, P.O. Box 252, St. Clairsville, OH 43950. It has recently undergone a name change to Wyoming Pocahontas Land Co. It is now a wholly owned subsidiary of the Ohio, Pennsylvania and West Virginia Coal Company. The Respondents are Wayne McAngues, R.D. 2, Dillonvale, Ohio 43917, the U.S. Department of Labor, Employment Standards Administration, Office of Workers' Compensation Programs, 200-Constitution Avenue, N.W., Washington, DC 20210, and the Benefits Review Board, U.S. Department of Labor, 1111 20th Street, N.W., Suite 757, Vanguard Building, Washington, DC 20036, which is a Respondent in name only. Rule 15(a), F.R. App. P.

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PETITION FOR WRIT OF CERTIORARI

The Youghiogheny and Ohio Coal Company (hereinafter Y & O) respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on June 15, 1993.

OPINIONS BELOW

Under the Federal statutes and regulations, "Black Lung" claims are first heard by Administrative Law Judge

(ALJ) of the Department of Labor. An "on the record" appeal lies to the Benefits Review Board (the Board or BRB), and then to the United States Court of Appeals. 33 U.S.C. §§ 921(b) and (c).

In this case there were three ALJ opinions, only one of which is reported at 14 B.L.R. 3-717. They are in the Appendix (referred to as "—a") at 19a, 35a, 45a. The Board's 1992, 1990 and 1986 decisions are not reported. They are at 13a, 24a and 40a. The Court of Appeals decision is reported at 996 F.2d 130 (1993). (1a-11a) The judgment is at 12a.

GROUNDS UPON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The judgment of the United States Court of Appeals was entered on June 15, 1993. This Petition for Certiorari is being filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1), 28 U.S.C. § 2101(c), 33 U.S.C. § 921(c) and 30 U.S.C. §§ 901 *et seq.*

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The following statutory and regulatory provisions are set forth in the Appendix:

1. The Federal Coal Mine Health & Saftey Act of 1969, as amended by the Black Lung Benefits Act of 1972 §§ 402 and 402, 30 U.S.C. §§ 901, 902. 61a-64a.

2. The Black Lung Benefits Reform Act, § 402, 30 U.S.C. § 902. 65a-67a.

3. 20 C.F.R. §§ 410.412; .426; 727.203; 718.203-205. 67a-80a.

STATEMENT OF THE CASE

As the Court of Appeals correctly summarized:

> "Wayne McAngues had worked as an underground coal miner for the Y&O for eleven years when he was involved in an automobile accident on May 4, 1976, in which he sustained serious head injuries. After being comatose for two weeks, McAngues recuperated to the point where today, he retains some disturbance of his balance and equilibrium, as well as possible brain damage which causes hemiparesis, or muscular weakness, on the right side of his body. After the accident, McAngues never worked again as a coal miner." (2a)

Mr. McAngues was born in 1939. He was 37 years old in 1976. Prior to the serious automobile accident, claimant did not lose much time from work and attended work regularly. No mention was ever made of pneumoconiosis in the hospitalizations after the accident. The medical records indicate that in June, 1976, he had to rely on a wheelchair and a quad cane to ambulate.

Claimant applied for black lung benefits in 1978. He indicated on his application that no doctor had ever told him he had black lung, and that he had stopped work because he was involved in a car accident which disabled him. He indicated that the date he believed his respiratory illness prevented him from engaging in his regular coal mine work was May 4, 1976, the *same date* as his automobile accident. Mr. McAngues admits he is presently receiving a Social Security disability award, and private insurance disability payments, due to his right side being paralyzed.

A pulmonary specialist, Dr. Kress, testified that Mr. McAngues was not totally disabled due to pneumoconiosis or any respiratory or pulmonary impairment. (81a) He testified that any total disability this man might have did not arise in whole or in part out of his coal mine employment, but from the auto accident. (81a) He also testi-

fied that on the basis of the man's respiratory condition, the man would be able to do his usual work or comparable and gainful work. (82a)

Dr. Tipton, the claimant's expert, conceded that Mr. McAngues "had to leave mining because of a car accident in which he sustained a head injury which caused partial paralysis of his right side." (56a) Dr. Tipton recognized the disturbance of balance and equilibrium, the obvious hemiparesis of the right side, the accompanying definite limp, and the tendency to drag the right foot. (58a) He disagnosed Mr. McAngues as having developed "simple coal workers' pneumoconiosis in association with the severe chronic obstructive pulmonary disease." (60a) Dr. Tipton concluded that Mr. McAngues was disabled regarding gainful coal mine employment. He did not, however, state what was the cause of the total disability, nor did he exclude the accident as a cause. (60a)[1]

Nearly all of the tests for disability due to pneumoconiosis, such as pulmonary ventilatory and arterial blood gas studies, did not show total disability levels. Nevertheless, the ALJ found the Claimant entitled to benefits. (45a) On the third appeal the BRB affirmed. (13a) The Court of Appeals affirmed, holding that the presumption of total disability applied and the fact of the totally disabling auto accident was irrelevant to Petitioner's effort to rebut that presumption! (1a)

A. The Statute

Section 401 of Title IV of the Federal Coal Mine Health & Safety Act of 1969 states that the Act's purpose

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[1] The Court of Appeals erroneously stated in passing that he ascribed it to pneumoconiosis. (2a) The Court of Appeals ultimately rested, however, as had the ALJ and the Board, on a presumption of total disability from pneumoconiosis that could not be rebutted by the employer.

was to provide benefits to living miners who are ". . . totally disabled due to pneumoconiosis. . . ." 30 U.S.C. § 901. The Secretary of H.E.W. was granted authority to define "total disability" in accordance with the Act, and that such regulations were to provide that a miner shall be considered totally disabled when his pneumoconiosis prevents him from engaging in gainful employment comparable to his mine employment. 30 U.S.C. § 902(f). No authority was given in the Act to provide benefits to live miners only "partially" disabled by pneumoconiosis.

Similar "total disability" requirements were set forth in the 1977 amendments to § 402(f). The Secretary of Labor's regulations were to continue to require that a miner be considered totally disabled when his pneumoconiosis prevents him or her from engaging in his gainful employment requiring skills and abilities comparable to miner's mine employment. 30 U.S.C. § 901(f)(1)(A). Although the 1977 Act relaxed the medical standards, 30 U.S.C. § 902(f), no authority was given to promulgate regulations, as to live miners, which would allow benefits for only partial disability due to pneumoconiosis.

B. The Regulations

The Secretary of H.E.W. promulgated 20 C.F.R. § 410.412 early in the program. True to the statute, it tracked the statutory requirement of total disability. The Department of Labor, however, in 1978 promulgated 20 C.F.R. § 727.203 which creates an interim presumption of total disability. Under those regulations, once a claimant establishes a presumptive case, the operator may rebut the presumption of total disability under the language of 20 C.F.R. § 727.203(b)(3) *only* if it can show that the total disability did not arise *in whole or in part* out of coal mine employment. The permanent regulations require a live miner to establish total disability pursuant to § 718.204.

C. The ALJ's and the Board's Decisions

The ALJ did not even mention the automobile accident in his first two Decisions and Orders. To grant benefits he simply invoked a presumption of total disability set forth in 20 C.F.R. §727.203(a)(1). (46a) The BRB remanded the claim to the ALJ twice to review for consideration of Petitioner's efforts to rebut the presumption under (b)(2) and or (b)(3). The BRB directed the ALJ to address and to determine the relevance of the hospital records regarding the accident. (30a) The Board affirmed the ALJ stating:

> ". . . [R]egardless of whether claimant was disabled by the car accident, the pertinent issue at subsection (b)(3) was whether pneumoconiosis played *any role* in his disabling impairment. *See Warman, supra; Gibas, supra; see also Borgeson, supra.* Therefore, we affirm the administrative law judge's weighing of the medical evidence at subsection (b)(3) and his finding of no rebuttal." (17a)

D. The Court of Appeals' Decision

In affirming, the Court of Appeals panel held that the presumption of total disability created by a finding of *some* x-ray evidence of pneumoconiosis could not be rebutted by the employer's showing that the disability had resulted from the auto accident. Applying the presumption, it held:

> "We affirm, however, because substantial evidence supports a finding of total coal-related pulmonary disability, and because we conclude that an employer's demonstration of a separate, non-respiratory disabling condition is irrelevant to a rebuttal of the presumption." (1a)

In so holding, the panel rejected a view of the standard apparently applied in the Fourth Circuit and at least one line of cases in the Seventh Circuit, and instead adopted a view espoused by the Tenth Circuit.

REASONS FOR GRANTING THE WRIT

THERE IS A CONFLICT AMONG THE U.S. COURTS OF APPEALS AS TO THE STANDARDS FOR REBUTTAL OF THE PRESUMPTION OF TOTAL DISABILITY DUE TO PNEUMOCONIOSIS AS ESTABLISHED BY 20 C.F.R. § 727.203(b)(3). THIS COURT SHOULD ACCEPT THE CASE AND SETTLE THE QUESTION BY ISSUING A NATIONAL STANDARD.

The Black Lung Acts require the payment of benefits to miners who are *totally disabled* because of pneumoconiosis where that pneumoconiosis arose from his employment in the mines. 30 U.S.C. §§ 901 and 902. *See Pauley* v. *Bethlehem Mines*, 501 U.S. ——, ——, 115 L.Ed.2d 604, 616 (1991). The Court's opinion and the regulation would allow recovery of benefits even though, as here, the uncontroverted evidence demonstrates that the claimant was in fact totally disabled as a result of other ailments from a serious automobile accident—having nothing to do with pneumoconiosis or employment in the mines. As written and as applied, the regulation conflicts with the statutory requirement that a claimant may only recover if he is "totally disabled due to pneumoconiosis." [2]

The Act as shown before, is designed to provide benefits for miners who were "totally disabled due to pneumoconiosis." The holding of the Sixth Circuit that the fact the claimant has been totally disabled on account of something other than pneumoconiosis is "irrelevant" to the

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[2] This Court has not been reluctant to examine regulatory presumptions when important questions are present. *See, Pittston Coal Group* v. *Sebbin*, 488 U.S. 105, 102 L.Ed. 407 (1988) which only dealt with the question of whether the invocation of the presumption of the existence of pneumoconiosis with less than ten years mining experience. *Pauley* v. *Bethlehem Mines*, 115 L.Ed.2d 604, 501 U.S. —— (1991) holds that § 727.203(b) did not conflict with § 902(f)(2) as to the "not more restrictive criteria" point. Here, the question of § 203(b)(3)'s compatibility with the basic statutory total disability scheme is the issue. This wasn't answered in *Pauley* and needs to be resolved.

application of an Act that is designed to provide benefits for miners who were "totally disabled due to pneumoconiosis," [3] only highlights a clear conflict and confusion in the circuits over the proper standards to be applied in cases where there is total disability from other causes, as well as some x-ray evidence of the presence of pneumoconiosis.

For example in *Shelton* v. *Director, OWCP*, 899 F.2d 690 (7th Cir., 1990), the Seventh Circuit, attempted to make sense of various formulations of the "contributing cause standard," including "necessary cause" and "substantial cause" concluded (899 F.2d 693):

> "The 'contributing cause' formulation suggests, in contrast, that *mining must be a necessary,* but need not be a sufficient, condition of the miner's disability; if he had not mined, he would not have become totally disabled, although he might have avoided the disability by care on some other front, for example by not smoking. We think this is the standard that the 'due to' regulation is artlessly attempting to pre-

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[3] Under 20 C.F.R. § 727.4(b) the sections of subpart D, Part 410 which are not inconsistent with the new Act, apply to Part 727 claims. They are appropriate to consider, in determining meaning and extent of the Act as to "total disability" due to pneumoconiosis. Under § 410.422(c), whether or not pneumoconiosis in a particular case rendered a miner totally disabled is determined from all of the facts of the case. Section 410.426(a) very clearly provides that:

> "A miner shall be determined to be under a disability only if his pneumoconiosis is (or was) the primary reason for his inability to engage in such comparable and gainful work. Medical impairments other than pneumoconiosis may not be considered." (71a)

As the Courts have clearly held under these standards, pneumoconiosis must be shown by a claimant to be the primary cause of his disability. *Gastineau* v. *Matthews*, 577 F.2d 356, 358 (6th Cir. 1978); *Ansel* v. *Weinberger*, 529 F.2d 304, 308-09 (6th Cir. 1976); *Hill* v. *Califano*, 592 F.2d 341, 346 (6th Cir. 1979); *Back* v. *Califano*, 593 F.2d 758 (6th Cir. 1979). Claimant has the burden of proving this. *Gastineau* v. *Matthews*, *supra*, at 359; *Prokes* v. *Matthews*, 559 F.2d 1057, 1060 (6th Cir. 1977).

> scribe, most as it corresponds to the standard of causation used in other areas of law. *Bastian* v. *Petren Resources Corp.*, 892 F.2d 680, 684, 686 (7th Cir. 1990); *Wisconsin Knife* v. *National Metal Crafters*, 781 F.2d 1820, 1289 (7th Cir. 1986) . . . A miner is not entitled to benefits if by reason of his heavy smoking *or some other activity or condition of his* that is not itself mining, he would have become totally disabled (and no later than he did) even if he had never gone near a coal mine. *To award benefits in such a case would be to confer a pure windfall, since by assumption the miner was no worse off by virtue of working in a mine than he would have been had he been working in an oxygen factory.*" (Emphasis added)

Shelton involved § 718.204(a), but the analysis of the Act's language of "total disability due to pneumoconiosis" applies regardless of whether the claim is a 718 or 727 claim.

Moreover, in *Robinson* v. *Pickands Mather & Co./Leslie Coal Co.*, 914 F.2d 35 (4th Cir., 1990) the Fourth Circuit reviewed the *Shelton* decision, and stated at 914 F.2d 38:

> "To give further meaning to this standard, we also adopt the Seventh Circuit's explanation in *Shelton* that the claimant's coal mining *must be a necessary condition of his disability. If the claimant would have been disabled to the same degree and by the same time in his life if he had never been a miner, then benefits should not be awarded.*" (Emphasis added)

The holding of the Sixth Circuit that the fact the claimant has been totally disabled on account of something other than pneumoconiosis is "irrelevant" to the application of an Act that is designed to provide benefits for miners who were "totally disabled due to pneumoconi-

osis," only highlights a clear conflict and confusion in the circuits over the proper standards to be applied in cases where there is total disability from other causes, as well as some evidence of pneumoconiosis.

The seemingly obvious proposition described in *Robinson* was rejected here with the Court below starkly declaring the existence of clear total disability from another cause "irrelevant" to the award of benefits. It thus granted the very windfall that the Courts in *Robinson* and *Shelton* found so inappropriate. Instead, it relied on a case from the Tenth Circuit, *Twin Pines Coal Co.* v. *United States Department of Labor*, 854 F.2d 1212, 1215 (1988). That case intuited in the statute an intention:

> "to confer benefits on miners who are disabled due to pneumoconiosis whether or not they are disabled from a different cause. Even when other causes are themselves independently disabling, '[t]he concurrence of two sufficient disabling medical causes, one within the ambit of the Act, and the other not, will in no way prevent a miner from claiming benefits under the Act.' *Peabody Pines Coal Co.* v. *Director, OWCP*, 778 F.2d 358, 363 (7th Cir. 1985).

Id. The Court below sought to reconcile these two conflicting lines of cases based on the proposition that the result ought to be different depending on whether the other totally disabling condition is also a pulmonary impairment, rather than some other type of total disability. *See also Hawkins* v. *Director*, 907 F.2d 697, 704 n.11 (7th Cir. 1990). But insofar as the resulting windfall is concerned, the result is clearly the same.

The underlying conflict in the cases finds its roots in the Secretary's own regulations. Although the Act only provides benefits for total disability due to pneumoconiosis, the Secretary's regulations allow a claimant invoke a rebuttable presumption of total disability due to pneumoconiosis based upon a limited showing: a positive x-ray [§ .203(a)(1)]; ventilatory tests [§ .203(a)(2)] or arte-

rial blood gas tests [§ .203(a)(3)] meeting certain values; or by a medical report stating the presence of total disability due to pneumoconiosis [§ .203(a)(4)].[4]

Under § .203(b), the operator may rebut the presumption after it has been invoked in a very limited number of ways. It may do so by showing the miner is in fact doing his usual coal mine work or comparable work [§ .203(b)(1)]; by evidence that he is able to do his usual coal mine work or comparable work [§ .203(b)(2)]; or that the miner does not have pneumoconiosis [§ .203 (b)(4)]. Rebuttal under (b)(1), where the man is still working, is very rare indeed. It is difficult to show rebuttal under (b)(4) when, as here, there is an x-ray showing pneumoconiosis present. Under (b)(3) of the

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[4] It is clear from the medical evidence of record, that the Claimant had the most minimal pneumoconiosis acceptable as such by the regulations. The evidence establishes rebuttal by showing the radiographic pneumoconiosis did not contribute to the admitted total disability which arose from the 1976 automobile accident and which continued up to and beyond October, 1979. As is obvious by the ALJ's and the BRB's comments quoted above, the correct (b)(3) standard was not addressed in reviewing this issue. Rather the ALJ merely noted the records did not address the existence of pneumoconiosis.

The generally accepted medical position is that simple pneumoconiosis is not total disabling *per se*. As this Court so appropriately recognized in *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 7, 49 L.Ed. 752, 761 (1976):

> "Simple pneumoconiosis, ordinarily identified by x-ray opacities of a limited extent, is generally regarded by physicians as seldom productive of significant ventilatory impairment. Complicated pneumoconiosis generally far more serious, involves progressive massive fibrosis, as complex reaction to dust . . . and usually produces significant pulmonary impairment. . ." (Emphasis added)

While x-rays can invoke the presumption, medically, of course, they only establish the presence or absence of the disease, not the disability (if any) therefrom. The medical evidence of record is clear that Mr. McAngues, if disabled at all, is disabled because of the unrelated auto accident, and not due to his minimal pneumoconiosis.

Secretary's regulations, however, the operator may show that "the total disability or death of the miner did not arise in whole or in part out of coal mine employment." [5]

York v. *BRB*, 819 F.2d 134 (6th Cir. 1987) held that if a claimant is totally disabled for *any reason* then (b)(2) rebuttal is precluded. With *York* v. *BRB* as law, the *only* rebuttal provision in .203(b) available to the operator in this claim is (b)(3). Without a proper application of (b)(3) rebuttal, the 727.203(a) presumption becomes, in fact, irrebuttable as rebuttal under 727.203 (b)(1) and (4) are not available.

The underlying source of the problem, creating the conflict in the circuits, appears to be the "in part" language of § .203(b)(3). By showing some pneumoconiosis, the claimant achieves the benefits of a presumption of total disability—but then an operator must show that the total disability did not arise, even *in part*, from the mine work. The result is that even a minimal degree of pneumoconiosis, which clearly would not be significant or disabling, nonetheless is held to be totally disabling, entitling the miner to benefits. This is facially inconsistent with the expressed intent of Congerss in passing legislation to provide benefits to miners "totally disabled because of pneumoconiosis." This would permit awards of benefits to claimants not totally disabled by pneumoconiosis in and of itself. Besides being inconsistent with the Act, this regulation places upon the employer an almost impossible standard of rebuttal in most cases, where pneumoconiosis (however minimal) is diagnosed. Under § .203(b)(3), as written, the employer must show that no part of the total disability arose out of coal mine employment. Moreover, as extended to a case like the present one, it produces a bizarre result. Since the claimant is totally disabled irrespective of any pneumoconiosis, it

[5] In this case, the Board did not even address operator's (b)(2) argument, and so the operator here was limited entirely to consideration of its (b)(3) rebuttal argument.

is difficult to see how the pneumoconiosis, in any meaningful sense, contributes even "in part" to the disability.[6] Much of the inherent difficulty in the cases stems from the inherent contradiction in trying to transform a minimal degree of pneumoconiosis, not totally disabling, into a basis for finding it the cause of a totally disabling condition.

Significantly, when the Secretary first tried to reach that result, the Board rejected it. In *Jones* v. *New River Coal Co.*, 3 BLR 1-199 (1981), and the line of decisions which followed, the Board noted that the statute only allows claims to be granted where the miner is totally disabled due to pneumoconiosis, but that the regulation purported to permit claims to be granted where the miner has only partial disability due to pneumoconiosis.

> "Section 727.203(b)(3) as written, however, permits the presumption to stand if only *part* of the disability of coal mine employment, *i.e.*, only *part* of the disability need be due to pneumoconiosis. This would permit awards of benefits to claimants not totally disabled by pneumoconiosis in and of itself. Besides being inconsistent with the Act, this regulation's phraseology places upon employer a nearly impossible burden of proof in cases, such as the instant one, where pneumoconiosis is diagnosed. Under Section 727.203(b)(3), as written, the employer must show that no *part* of the total disability arose out of coal mine employment." (Emphasis in original) *Id.* at 208-209.

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[6] The effect of the regulation relied upon by the Court in this case is to expand the scope of the entabling Act. If the Courts can reject uncontradicted medical evidence of total disability from other sources as irrelevant the § 727.203(a) presumptions, in fact, become irrebuttable. Since Congress has clearly chosen not to make the interim presumption irrebuttable, as demonstrated by 30 U.S.C. § 921(c) and by the legislative history of the Reform Act, the Secretary has to promulgate regulations which reasonably allow rebuttal as intended by Congress. The "in part" language of § .203(b)(3) should not be sustained as valid *as written nor as applied.*

The Board developed the standard whether pneumoconiosis is "in and of itself, totally disabling". *Wilburn* v. *Director,* 11 B.L.R. 1-135 (1988). But this approach was rejected by several Courts of Appeals. *See, Shelton* v. *Director,* 899 F.2d 690, 692, *supra.* Similarly, the courts rejected the seemingly common notion of "substantial cause" as a basis for liberalizing the statutory standard.

One common formulation used to rationalize that partial disability equals total disability is that,

> "If an employer is able to prove that pneumoconiosis played *no part* in causing the miner's disability, then the employer has satisfied the requirements of § 727.-203(b)(3). Where, however, pneumoconiosis is a *contributing* cause to a miner's total disability, he is conclusively entitled to benefits." (Emphasis added)

Gibas v. *Saginaw Mining Co.,* 748 F.2d 1112, 1120 (6th Cir., 1984); *see also, Carozza* v. *U.S. Steel Corp.,* 727 F.2d 74 (3rd Cir. 1984); and *Bethlehem Mines Corp.* v. *Massey,* 736 F.2d 120, 123 (4th Cir. 1984). Under these standards, it would at least be arguable that the pneumoconiosis needed to be some causative element of the disability. Under the holding of the Court below, and the cases that it follows, all that must be shown is that pneumoconiosis is some part of *claimant's condition,* not that it was a necessary (or even 1%) contributing cause of the claimant's inability to work.[7]

To allow the Court of Appeals decision to stand would be to place an impossible burden upon coal mine operators to rebut a presumption of total disability once it is invoked. In many, if not all, cases it would be impossible

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[7] The Court of Appeals here try to save the regulation by saying that the "in part" language refers to causation, not total disability. It is impossible to see how this tautology saves the regulation. If only part of the disability arises from pneumoconiosis (even if all causes considered together, the claimant is totally disabled), clearly the pneumoconiosis is only a partially causative factor. Either way, coal mine exposure has only caused a part of the inability to work.

to prove that the miner's total disability did not arise in some small part out of his coal mine employment. The issue arises frequently. There are many respiratory and pulmonary diseases which have nothing to do with coal dust and stir no controversy on the point. Some may be caused by genetic deficiencies, or bacteria, or cigarette abuse, or metastatic cancer not primary in the lung, or trauma, or obesity, or allergies, or asthma, or some other non-employment related source. There are many situations where other things cause total disability. The result of the regulation, therefore, is to provide compensation in all cases of pneumoconiosis virtually irrespective of degree.

CONCLUSION

The Court should grant certiorari to resolve the question raised about the standard to be applied in determining whether (if ever) the presence of some pneumoconiosis can be deemed totally disabling when the claimant is totally disabled from other causes—and to resolve a clear conflict in the circuits that has produced results in cases like this one.

The Court of Appeals decision runs counter to the 4th and 7th Circuits and this Court's *Usery* opinion. It departs from the accepted and usual course of judicial proceedings. It sets an improper standard for other cases to be adjudicated under. Thus, it is important that the writ issue.

Respectfully submitted,

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September 9, 1993

APPENDIX

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 92-3765

THE YOUGHIOGHENY & OHIO COAL COMPANY,
Petitioner,

v.

WAYNE N. MCANGUES and DIRECTOR,
OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,
Respondents.

On Appeals from a Decision of the Benefits Review Board

Decided and Filed June 15, 1993

Before: MILBURN, RYAN, and NORRIS, Circuit Judges.

RYAN, Circuit Judge. The Youghiogheny & Ohio Coal Company appeals from the decision awarding benefits to claimant Wayne McAngues under the Black Lung Benefits Act, 30 U.S.C. §§ 901 *et seq.* Y&O contends that it rebutted the regulatory interim presumption of total coal-related pulmonary disability when it showed that McAngues suffered disabling non-respiratory injuries in an autmomobile accident. We affirm, however, because substantial evidence supports a finding of total coal-related pulmonary disability, and because we conclude that an employer's demonstration of a separate, non-respiratory disabling condition is irrelevant to a rebuttal of the presumption.

I.

Wayne McAngues had worked as an underground coal miner for Y&O for eleven years when he was involved in an automobile accident on May 4, 1976, in which he sustained serious head injuries. After being comatose for two weeks, McAngues recuperated to the point where today, he retains some disturbance of his balance and equilibrium, as well as possible brain damage which causes hemiparesis, or muscular weakness, on the right side of his body. After the accident, McAngues never worked again as a coal miner.

McAngues first applied for blank lung benefits in April 1978. He was twice awarded benefits by the ALJ only to have his case remanded by the Benefits Review Board.[1] In 1990, however, the ALJ issued a second supplemental decision and order on second remand, again awarding McAngues benefits, and this award was affirmed by the Board. It is from that decision that Y&O appeals.

In reaching his decision, the ALJ largely focused on evidence from two different doctors—one hired by the employer, and one hired by the claimant. The latter concluded that McAngues was disabled due to pneumoconiosis resulting from his former employment as a coal miner, while the former believed that McAngues' total disability was entirely attributable to his car accident.

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[1] In the ALJ's first decision, he invoked, based on chest x-ray evidence, a regulatory "interim presumption" of total disability due to pneumoconiosis, and also concluded that the employer's evidence failed to rebut that presumption. The Board vacated and remanded for further consideration of whether rebuttal was established. The ALJ then relied on the opinion of the claimant's expert, crediting his findings over that of the employer's expert, and again concluded that rebuttal was not established. The Board remanded again, this time because it found the ALJ had not provided an adequate rationale for discrediting the opinion of the employer's expert, and because the ALJ had not discussed McAngue's car accident.

Dr. George Kress was the employer's expert witness. He examined McAngues in 1979, and made the following conclusions:

> Ventilatory pulmonary function studies were done. His forced vital capacity was 4.17, 107% of predicted normal. FEVI was 3.2, 110% of predicted and 77% of the actual vital capacity. Maximum voluntary ventilation, the best determination we could get, was 75.6 liters per minute or 60% of predicted.[2] It was my feeling in watching him perform this test that we did not get maximum effort and I believe in view of the normal vital capacity and FEVI that this observation is confirmed. I would not, therefore, consider the maximum voluntary ventilation valid and it is my opinion that he has no ventilatory impairment.

(Footnote added.) Dr. Kress's view was that McAngues

> does demonstrate evidence of coal workers' pneumoconiosis, occupationally acquired, but he does not present with any evidence to indicate any disability or impairment as a result of this pneumoconiosis and his former coal mine employment. I do believe he is disabled but this disability is due entirely to residuals from a severe head injury sustained in an auto accident.

Dr. Jon Tipton was the claimant's expert witness, and he examined McAngues in January 1982. His report following that examination details McAngues' history of working in the mines. Within a year of working, McAngues began to note shortness of breath, and began to cough excessively and expectorate gray and black mucus. Within five years, McAngues was short of breath on

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[2] Under 20 C.F.R. § 727.203(a)(2), a man of McAngues's height (67 inches) is disabled with an FEV_1 value of 2.3 and an MVV value of 92.

climbing one flight of stairs. And by eleven years, he was short of breath on climbing less than one flight. At the time of the 1982 examination, McAngues could walk no more than a block and a half.

Dr. Tipton made the following conclusions regarding McAngues's lungs:

> Ventilatory studies demonstrate a FEVI of 1.61 liters with a maximum voluntary ventilation recorded at 36 liters. The forced vital capacity was 2.64 liters. . . . The PO2 is 74.8 with the PCO2 of 30.7. The PH is 7.445. This is at room air. Chest x-ray demonstrates evidence of fine nodular densities in both lungs, most probably on the basis of pneumoconiosis.
>
> Thus, Mr. Angues has developed simple coal workers pneumoconiosis in association with the severe chronic obstructive pulmonary disease. Obviously, the coal workers pneumoconiosis is consequence of his prolonged coal mine exposure. Based on the studies and the history and the examination, it is my opinion that Mr. McAngues is disabled regarding gainful coal mine employment.

Dr. Kress reviewed Dr. Tipton's findings, and disagreed with the results. He believed that Mr. McAngues's deterioration between 1979 and 1982 "far exceed[ed] what is recognized as can be expected in the natural progression of chronic obstructive pulmonary disease." This led him to "suspect that [McAngues] must have had a respiratory infection at the time of Dr. Tipton's examination."

McAngues testified, however, that he did not have a cold on the day he was examined by Dr. Tipton, and Dr. Tipton made no findings that would indicate McAngues had a cold or other acute, as opposed to chronic, respiratory infection.

The ALJ credited Dr. Tipton's opinion over that of Dr. Kress, primarily because Dr. Tipton reached his very

specific conclusions immediately after examining McAngues, while Dr. Kress's more general 1982 conclusions were based largely on speculation. In addition, the ALJ noted that Dr. Tipton's findings of disability were supported by the 1982 ventilatory test results. The ALJ thus concluded that Y&O had not rebutted the presumption that McAngues was totally disabled due to pneumoconiosis.

> I accept Dr. Tipton's conclusions over those of Dr. Kress and find that the Claimant has a totally disabling pulmonary impairment caused by his pneumoconiosis. . . . As the Board stated in its decision, the Employer must prove that pneumoconiosis played no part in causing the miner's disability to establish (b)(3) rebuttal. So that even if the Employer had been able to establish that the Claimant's pneumoconiosis was less than totally disabling, within the meaning of the Act, he could not establish rebuttal unless he proved that it made no contribution to his disability.

The ALJ also considered McAngues's medical records from the period following his car accident, and concluded that they did not support an inference that the accident caused any pulmonary impairment.

The Board affirmed this decision, finding that the ALJ's findings of fact and conclusions of law were supported by substantial evidence, were rational, and were consistent with applicable law. It held that the ALJ properly accorded Dr. Tipton's opinion greater weight, and it refused to substitute its own inference for the ALJ's inference that Dr. Tipton's opinion supported a finding that McAngues was totally disabled due to pneumoconiosis. It also held that the ALJ properly accorded little weight to the records regarding McAngues's car accident, and that it was irrelevant whether McAngues was totally disabled as a result of his 1976 accident.

II.

A.

Y&O contends that because the evidence demonstrates that McAngues is totally disabled due to his 1976 car accident, pneumoconiosis simply cannot be a contributing, or necessary, cause of his total disability. Y&O further suggests that the ALJ failed to adequately discuss the relative roles that pneumoconiosis and the car accident played in McAngues's total disability.

As we have already mentioned, McAngues was determined to be entitled to the benefit of an interim presumption of disability due to coal-related pneumoconiosis based on x-ray evidence. 20 C.F.R. §§ 727.203 (a) & (a)(1). Y&O does not dispute McAngues's entitlement to the presumption, but it raises several arguments as to why it should be held to have rebutted the presumption under 20 C.F.R. § 727.203(b)(3). Once the interim presumption is established, the burdens of production and persuasion shift to the employer to demonstrate rebuttal. *Gibas v. Saginaw Mining Co.*, 748 F.2d 1112, 1120 (6th Cir. 1984), *cert. denied*, 471 U.S. 1116 (1985). The regulation relating to rebuttal reads as follows:

> (b) *Rebuttal of interim presumption.* In adjudicating a claim under this subpart, all relevant medical evidence shall be considered. The presumption in paragraph (a) of this section shall be rebutted if:
>
> . . . .
>
> (3) The evidence establishes that the total disability or death of the miner did not arise in whole or in part out of coal mine employment . . . [.]

20 C.F.R. §§ 727.203(b) & (b)(3).

This court has not directly addressed the issue presented by this case, whether an independent, totally disabling condition that predates the existence of a pul-

monary disability establishes rebuttal under section (b)(3).[3] We have, however, considered the standard for section (b)(3) rebuttal in other contexts on several occasions. We understand these cases to mean that so long as McAngues demonstrates that his total disability arose, at least partially, from coal-related pneumoconiosis, the existence of disabling effects from the auto accident is immaterial. Put another way, if pneumoconiosis at least partially contributes to his total disability, he is entitled to recover benefits. *See, e.g., York v. Benefits Review Bd.*, 819 F.2d 134, 137 (6th Cir. 1987); *Gibas*, 748 F.2d at 1120.

Y&O suggests that the "contributing cause" doctrine formulated in two cases from other circuits, *Shelton v. Director, OWCP*, 899 F.2d 690 (7th Cir. 1990), and *Robinson v. Pickands Mather & Co.*, 914 F.2d 35 (4th Cir. 1990), reflects the reasoning that once an employer proves total disability due to something other than coal-related pulmonary disability, it has, under section (b)(3), rebutted the interim presumption. Y&O points, in particular, to the following language:

> A miner is not entitled to benefits if by reason of his heavy smoking or some other activity or condition of his that is not itself mining, he would have become totally disabled (and no later than he did) even if he had never gone near a coal mine. To award benefits in such a case would be to confer a pure windfall, since by assumption the miner was no worse off by virtue of working in a mine than he would have been had he been working in an oxygen factory. The Black Lung Benefits Act is generous, but not that generous. It is not a welfare program for cigarette smokers.

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[3] Because we find the car accident irrelevant to the question of rebuttal, we do not find it necessary to decide the question whether, as Y&O argues, the car accident resulted in total disability for McAngues.

Shelton, 899 F.2d at 693; *see also Robinson*, 914 F.2d at 37-38. Both *Shelton* and *Robinson* dealt with situations in which a miner had been shown to be totally disabled due to pulmonary disease, but the evidence failed to definitively show the relative weights that smoking and coal-mining bore in causing the pulmonary disability. The considerations in such cases are quite different than in this case, where both parties have arguably demonstrated the existence of two totally disabling, though entirely unrelated, conditions. This case does not require resolution of the possible synergistic effects of two activities that are harmful to the lungs, such as smoking and coal-mining. Y&O, in fact, does not dispute that McAngues's lung disability relates solely to coal-mining.

We therefore do not read *Shelton* and *Robinson* to suggest that, in this case, McAngues's preexisting independent disability must rebut the presumption of disability resulting from coal-related pulmonary disability. Such a conclusion would result in a conflict with the existing Sixth Circuit case law to which we have already referred. We instead adopt the reasoning of the Tenth Circuit in this area, in which the court explicitly foreclosed the argument suggested by Y&O:

> Twin Pines argues that because White was already completely disabled by the 1970 accident he cannot now be considered disabled as a result of pneumoconiosis; that is, a person can only be completely disabled once.
>
> . . . [A] review of the cases, the statute, its legislative history, and its interpretation by the benefits review board . . . shows that *the statute is intended to confer special benefits on miners who are disabled due to pneumoconiosis whether or not they are disabled from a different cause.* Even when other causes are themselves independently disabling "[t]he concurrence of two sufficient disabling medical causes one within the ambit of the Act, and the

> other not, will in no way prevent a miner from claiming benefits under the Act." *Peabody Coal Co. v. Director, OWCP*, 778 F.2d 358, 363 (7th Cir. 1985[.][4] . . .

Twin Pines Coal Co. v. United States Dep't of Labor, 854 F.2d 1212, 1215 (10th Cir. 1988) (emphasis added) (footnote added) and (citations omitted).

We thus reject Y&O's argument that an employer establishes rebuttal if it can demonstrate a total disability that predates a claimant's total disability from pneumoconiosis. If a claimant proves that he is totally disabled, and further, that the disability is at least partially the result of coal-related pneumoconiosis, then he is entitled to benefits under the Act. An employer cannot rebut the presumption of total disability by showing a second disability that is entirely independent of a claimant's disabling pneumoconiosis.

We likewise reject Y&O's suggestion that the ALJ did not adequately discuss the role the car accident played in McAngues's disability. The ALJ's conclusion is perfectly clear: McAngues is totally disabled due to coal-related pneumoconiosis. There is, also, evidence in the record that McAngues is disabled due to the 1976 car accident. The ALJ did not make a clear conclusion on that issue—but there can be no reasonable doubt that he did firmly conclude that McAngues's pneumoconiosis would have left him totally disabled even in the absence of the car accident.

B.

We next address Y&O's contention that the ALJ's finding of total pulmonary disability is not supported by substantial evidence.

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[4] The Seventh Circuit has cautioned that *Shelton* does not overrule this holding of *Peabody*. *Hawkins v. Director, OWCP*, 907 F.2d 697, 704 n.11 (7th Cir. 1990).

Y&O argues that in rejecting Dr. Kress's conclusion that McAngues's apparent respiratory deterioration between 1979 and 1982 was too rapid to be the result of pneumoconiosis, the ALJ improperly placed his own expertise against that of the doctor, and that more credence should have been given to Dr. Kress's suggestion that McAngues was suffering from a cold at his 1982 examination. Y&O also argues that Dr. Tipton did not conclude that McAngues was disabled because of pneumoconiosis; it contends that Dr. Tipton's letter as a whole indicates that he viewed the car accident as the cause of the total disability.

This court reviews decisions below only to decide whether they are supported by substantial evidence and in accordance with the applicable law. *Kolesar v. Youghiogheny & Ohio Coal Co.*, 760 F.2d 728, 729 (6th Cir. 1985) (per curiam). Review on appeal should focus on whether the ALJ—not the Board—had substantial evidence on which to base its decision. *Zimmerman v. Director, OWCP*, 871 F.2d 564, 566 (6th Cir. 1989).

Given this limited scope of review, this court cannot substitute its own judgment for that of the ALJ, so long as the ALJ has carefully considered each part of the evidence. *Knuckles v. Director, OWCP*, 869 F.2d 996, 998 (6th Cir. 1989). Substantial evidence is relevant evidence that a reasonable mind would accept as adequate to support a conclusion. *Ramey v. Kentland Elkhorn Coal Corp.*, 755 F.2d 485, 488 (6th Cir. 1985). In deciding whether a decision meets the "substantial evidence" requirement, this court may consider whether an ALJ adequately explained the reasons for crediting certain testimony and evidence over other evidence in the record. *Director, OWCP v. Congleton*, 743 F.2d 428, 430 (6th Cir. 1984).

Contrary to Y&O's suggestion, it is perfectly apparent that the ALJ did not simply reject Dr. Kress's opinion in favor of his personal medical beliefs. Instead, he com-

pared two competing medical opinions and rejected one in favor of the other, and gave adequate reasons for doing so. None of Y&O's specific arguments—that the ALJ should have given more credence to Dr. Kress's belief that McAngues had a cold, and that the ALJ should have viewed Dr. Tipton's reference to "history" as a reference to McAngues's car accident—provides any significant challenge to the ALJ's conclusion. Dr. Tipton's opinion, supplemented with the objective test results, constitute substantial evidence that more than adequately supports the ALJ's conclusion.

C.

Y&O finally argues that the pulmonary function study relied on by Dr. Tipton did not state the paper speed for the test, and that the study is therefore invalid under 20 C.F.R. § 718.103(b)(6), which requires that the paper speed, *inter alia*, be stated for every test. Yet another regulation, however, limits the applicability of section 718.103 to evidence offered to *establish* a presumption. 20 C.F.R. § 727.206. No regulation speaks to the applicability of the requirements of section 718.103 in the case of *rebutting* a presumption. *See Saginaw Mining Co. v. Ferda*, 879 F.2d 198, 205-06 (6th Cir. 1989). The test's failure to comply with section 718.103 is therefore simply not a basis for reversal in this case.

III.

For the reasons discussed above, we AFFIRM.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No.: 92-3765

THE YOUGHIOGHENY AND COAL COMPANY,
Petitioner,

v.

WAYNE M. MCANGUES; DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Respondent.

Before: Milburn, Ryan, and Norris, Circuit Judges

JUDGMENT

[Filed June 15, 1993]

THIS MATTER came before the court on appeal of a decision by the Benefits Review Board against claimant Wayne McAngues.

UPON FULL REVIEW of the record and the briefs and arguments of counsel,

IT IS ORDERED that the decision of the Board in this matter is affirmed.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
LEONARD GREEN
Clerk

A True Copy.

Attest:

/s/ Valerie Fields
Deputy Clerk

U.S. DEPARTMENT OF LABOR
BENEFITS REVIEW BOARD
800 K Street, N.W.
Washington, D.C. 20001-8001

[SEAL]

BRB No. 91-0485 BLA

OWCP No. 292-32-6668

WAYNE M. MCANGUES,
Claimant-Respondent,

v.

THE YOUGHIOGHENY & OHIO COAL COMPANY,
Employer-Petitioner,

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,
Party-in-Interest.

DECISION AND ORDER

Date Issued: June 26, 1992

Appeal of the Second Supplemental Decision and Order on Second Remand of Charles P. Rippey, Administrative Law Judge, United States Department of Labor

Edmund A. Sargus, Jr. (Hanlon, Duff & Paleudis), St. Clairsville, Ohio, for employer.

Before: SMITH and DOLDER, Administrative Appeals Judges, and LIPSON, Administrative Law Judge.*

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* Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. § 921(b)(5) (1988).

PER CURIAM:

Employer appeals the Second Supplemental Decision and Order on Second Remand (80-BLA-8038) of Administrative Law Judge Charles P. Rippey awarding benefits on a claim filed pursuant to Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. § 901 *et seq.* (the Act). This case is before the Board for a third time. In the original Decision and Order, the administrative law judge found that claimant had established invocation of the interim presumption pursuant to 20 C.F.R. § 727.203(a)(1) and (a)(2), and that employer had failed to establish rebuttal of the presumption pursuant to 20 C.F.R. § 727.203(b). Accordingly, benefits were awarded. Subsequently, on reconsideration, the administrative law judge found that payment of benefits should commence from April 1978. Employer appealed, asserting that the administrative law judge had erred in failing to find rebuttal pursuant to 20 C.F.R. § 727.203(b)(2) and (b)(3) and in his determination of the entitlement date. In response to this appeal, the Board held that the administrative law judge had erred in his weighing of the medical evidence, and remanded the case for reconsideration of the evidence pursuant to subsections (b)(2) and (b)(3). The Board also held that on remand the administrative law judge was to reconsider the entitlement date in the event benefits were again awarded, inasmuch as the administrative law judge did not discuss all the medical evidence relevant to the date of onset. *McAngues v. The Youghiogheny & Ohio Coal Co.*, BRB No. 83-0131 BLA, slip op. at 3 (May 2, 1986) (unpub.).

In his First Supplemental Decision and Order Upon Remand, the administrative law judge again found the evidence insufficient to establish rebuttal under either subsection (b)(2) or (b)(3) and reiterated his finding that April 1978 was the date of entitlement. Employer appealed again, contending that the administrative law judge had erred in failing to find rebuttal established

pursuant to subsection (b)(3) and had failed to follow the Board's order to consider all of the medical evidence in determining the date of entitlement. In its second Decision and Order, the Board remanded the case and instructed the administrative law judge to reconsider the medical evidence under subsection (b)(3) and to modify the date of entitlement, if necessary, in light of the holding in *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989). *McAngues v. The Youghiogheny & Ohio Coal Co.*, BRB No. 86-2151 BLA, slip op. at 3-8 (May 31, 1990) (unpub.). In his Second Supplemental Decision and Order on Second Remand, the administrative law judge found that employer had not established rebuttal under Section 727.203(b)(3). He also found that the date of entitlement was October 1979. Accordingly, benefits were awarded. Employer appeals, contending that the administrative law judge erred in his analysis of the evidence at subsection (b)(3) and in determining the date of entitlement. Claimant has not responded to this appeal. The Director, Office of Workers' Compensation Programs, (the Director), as party-in-interest, filed a letter stating that he would not participate in this appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. § 921(b)(3), as incorporated into the Act by 30 U.S.C. § 932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Regarding subsection (b)(3) rebuttal, employer contends that the administrative law judge erred in his analysis of Dr. Kress's opinion and Dr. Tipton's opinion. Specifically, employer argues that the administrative law judge erroneously rejected the opinion of Dr. Kress because the administrative law judge found that the doctor's specific opinion was based on a general statement, and that the

administrative law judge has placed his expertise against that of Dr. Kress.

In order to establish rebuttal pursuant to subsection (b)(3), employer must prove that pneumoconiosis played no part in causing the miner's disability. Where pneumoconiosis is a contribuing cause to a miner's disability, he is conclusively entitled to benefits. *Warman v. Pittsburg & Midway Coal Mining Co.*, 839 F.2d 257, 11 BLR 2-62 (6th Cir. 1988); *Gibas v. Saginaw Mining Co.*, 748 F.2d 1112, 7 BLR 2-53 (6th Cir. 1984), *cert. denied*, 471 U.S. 1116, 105 S.Ct. 2357, 86 L.Ed. 258 (1985); *see also Saginaw Mining Co v. Ferda*, 879 F.2d 198, 12 BLR 2-376 (6th Cir. 1989); *Borgeson v. Kaiser Steel Corp.*, 12 BLR 1-169 (1989) (*en banc*).

The administrative law judge, in crediting the opinion of Dr. Tipton over that of Dr. Kress, stated that, "[w]hile general statements may be accurate, generally, individuals vary widely in their reactions to coal dust, and I will not, under the circumstances found here, accept the conclusion based only on a general rule over the findings of the physician who examined and tested the [c]laimant at the time he made contrary findings." Decision and Order on Second Remand at 2. In his deposition of March 3, 1982, Employer's Exhibit 1, Dr. Kress stated that the basis for his conclusions about claimant was that he did, "see individuals with pneumoconiosis where you remove them from further exposure where they may show progression . . . over a period of time," but, "in most instances that should not go on beyond over two or three years, if that long." Employer's Exhibit 1 at 35-36. The physician concluded that simple pneumoconiosis is rarely if ever disabling. *See* Employer's Exhibit 1 at 36.

We affirm the administrative law judge's weighing of the opinions of Drs. Kress and Tipton, as the administrative law judge, within a proper exercise of his discretion as trier-of-fact, accorded Dr. Tipton's opinion greater weight because Dr. Kress based his conclusion on the

general population rather than relating his conclusions to claimant's specific case, *see* Decision and Order on Second Remand at 2-3; *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5 (1985), and because Dr. Tipton was the most recent examining physician, *Ferda, supra*; *see Cosalter v. Mathies Coal Co.*, 6 BLR 1-1182 (1984); *Bogan v. Consolidation Coal Co.*, 6 BLR 1-1000 (1984); *see also Orange v. Island Creek Coal Co.*, 786 F.2d 724, 8 BLR 2-192 (6th Cir. 1986). In addition, we hold that employer's allegation that Dr. Tipton's report does not support a finding of a totally disabling respiratory condition is a request for the Board to reweigh the evidence, a function that the Board is not empowered to perform. *See Anderson v. Camp Valley of Utah, Inc.*, 12 BLR 1-111 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). We further hold that employer's contention that the administrative law judge failed to follow the Board's directive as it related to the post car accident treatment records is without merit, as the administrative law judge, within a proper exercise of his discretion as trier-of-fact, examined these records and implicitly gave them little weight as he found that these records were directed to monitoring the injuries from claimant's car accident, and not for the purpose of determining the existence of pneumoconiosis or claimant's pulmonary condition, Decision and Order on Second Remand at 3; *see generally Sacolick v. Rushton Mining Co.*, 6 BLR 1-930 (1984). In addition, regardless of whether claimant was disabled by the car accident, the pertinent issue at subsection (b)(3) was whether pneumoconiosis played any role in his disabling impairment. *See Warman, supra*; *Gibas, supra*; *see also Borgeson, supra*. Therefore, we affirm the administrative law judge's weighing of the medical evidence at subsection (b)(3) and his finding of no rebuttal.

Employer also contests the administrative law judge's finding of an onset date of October 26, 1979. The onset date is not established by the first medical evidence of record indicating total disability or by medical evidence

sufficient to invoke the interim presumption at 20 C.F.R. § 727.203(a). Rather, such medical evidence indicates that the miner became totally disabled at some time prior to the date of such medical evidence. *See Merashoff v. Consolidation Coal Co.*, 8 BLR 1-105 (1985); *Henning v. Peabody Coal Co.*, 7 BLR 1-753 (1985); *Hall v. Consolidation Coal Co.*, 6 BLR 1-1306 (1984). The administrative law judge credited Dr. Kress' October 25, 1979, report as having proven that the claimant was not totally disabled on that date. On January 5, 1982, Dr. Tipton performed a pulmonary function study which indicated respiratory disability. The administrative law judge considered Dr. Tipton's January 5, 1982, report and Dr. Kress' October 25, 1979, report, and held that, in the absence of contrary evidence, the date of onset of total disability was the day after the nonqualifying exam. Decision and Order on Second Remand at 4. As the administrative law judge considered the relevant medical evidence in determining the date of onset, *see Lygins, supra,* and since the Board is not empowered to reweigh the evidence nor substitute its inferences for that of the administrative law judge, *see Worley, supra*; *Anderson, supra,* we affirm the administrative law judge's date of onset finding.

Accordingly, the administrative law judge's Decision and Order awarding benefits on remand is affirmed.

SO ORDERED.

/s/ Roy P. Smith
ROY P. SMITH
Administrative Appeals Judge

/s/ Nancy S. Dolder
NANCY S. DOLDER
Administrative Appeals Judge

/s/ Sheldon R. Lipson
SHELDON R. LIPSON
Administrative Law Judge

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
1111 20th Street, N.W.
Washington, D.C. 20036

[SEAL]

Date: November 02, 1990

Case No.: 80-BLA-8038

OWCP No.: 292-32-6668

IN THE MATTER OF

WAYNE H. MCANGUES,
Claimant,

v.

YOUGHIOGHENY OHIO COAL CO.,
Employer,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party In Interest.

SECOND SUPPLEMENTAL DECISION AND ORDER ON SECOND REMAND

This case is before me for the third time. The Employer appealed my Supplemental Decision and Order Upon Remand issued July 22, 1986 to the Benefits Review Board. On May 31, 1990, the Benefits Review Board again remanded this case to me for further reconsideration, and on October 16, 1990 forwarded the file in this matter to this Office.

The Board concluded that the opinion of Dr. Kress, if fully credited, could establish rebuttal under Sec. 727.203(b)(3) of the regulations. The Board further

concluded that I had not provided a valid reason for rejecting the opinion of Dr. Kress. Accordingly, the Board remanded the case to me for further consideration of that question.

The Board did not overturn my previous finding that Dr. Kress was mistaken in thinking that Dr. Tipton had stated or inferred that the Claimant was suffering from an acute condition when he performed the ventialtory test in 1982 that produced qualifying results. That finding stands.

Dr. Kress stated that the 1982 qualifying ventilatory tests could not be related to pneumoconiosis because deterioration of lung functioning ceases within two years after the stopping of coal mine employment when only simple pneumoconiosis is involved, and in this case the Claimant ceased coal mine employment six years earlier, in 1976.

Dr. Tipton, on the other hand, found that the Claimant's severe chronic obstructive pulmonary disease and pneumoconiosis disabled him from coal mine employment. I reject the Employer's conclusion that when Dr. Tipton said, "Based on the studies and the history and the examination, it is my opinion that Mr. McAngues is disabled regarding gainful coal mine employment" that he was not stating a reason for the disability, and could have been referring only to the Claimant's 1976 automobile accident and its results. The sentence immediately preceding the one just quoted referred only to lung disability and pneumoconiosis, and I find no basis to conclude such devious trickery on Dr. Tipton's part. I think the natural reading and only reasonable inference is the one that I have made and given to Dr. Tipton.

Dr. Kress states that lung function due to obstructive defects does not continue to detriorate more than two years or so following the end of coal dust exposure because the areas of inflammation will have, by that time, turned to fibrosis or scar tissue. Dr. Kress uses this gen-

eral statement to support a specific conclusion about the Claimant in 1982 when he has not seen the Claimant since 1979. Dr. Tipton, on the other hand, reached his contrary conclusion immediately after his examination of the Claimant in January of 1982. While general statements may be accurate, generally, individuals vary widely in their reactions to the insult of coal dust, and I will not, under the circumstances found here, accept the conclusion based only on a general rule over the findings of the physician who examined and tested the Claimant at the time he made contrary findings.

There is no evidence in this record that ventilatory tests measure only obstructive defects of the type to which Dr. Kress made reference. In addition to Dr. Tipton's statements about obstructive defects, his findings disability are supported by the qualifying ventilatory test results obtained in 1982.

Dr. Kress' extremely good qualifications as a pulmonary expert appear in the record. The curriculum vitae of Dr. Tipton is not in the record. Therefore, there is no basis upon which to reach any conclusions regarding Dr. Tipton's special qualifications or make any comparison of them to those of Dr. Kress.

For the reasons stated, I accept Dr. Tipton's conclusions over those of Dr. Kress and find that the Claimant has a totally disabling pulmonary impairment caused by his pneumoconiosis. Even if I were to have found that the conflict between the two doctors could not be resolved and created a reasonable doubt, that doubt would have to be resolved in favor of the Claimant, and, therefore, the Employer could not have been found to have carried his burden of rebuttal under Sec. 727.203(b)(3) of the regulations. As the Board stated in its decision, the Employer must prove that pneumoconiosis played no part in causing the miner's disability to establish (b)(3) rebuttal. So that even if the Employer had been able to establish that the Claimant's pneumonociosis was less

than totally disabling, within the meaning of the Act, he could not establish rebuttal unless he proved that it made no contribution to his disability.

THE CLAIMANT'S 1976 AUTOMOBILE ACCIDENT

The Board also asks that I consider the treatment records following the Claimant's 1976 automobile accident, to determine if they "support an inference of no pulmonary impairment." If such an inference is supported, then that inference must be added to the total evidence, which, then, must be reweighed.

As requested, I have reviewed the treatment records following the Claimant's 1976 automobile injury. In May of 1976 he received severe head injuries and a contusion of the anterior left chest in an automobile accident. He was unconsicous for two weeks, and suffered memory loss, confusion, and right sided muscle weakness. These improved over time, but deficits in right sided muscle loss, particularly, have been permanent. Chest x-rays rays were said to be within normal limits, but it is apparent that there was no search for or suspicion of pneumoconiosis or pulmuary function problems. None of the x-ray readers had any special qualifications for the reading of x-ray films for pneumoconiosis. It is readily apparent from an examination of these records that the search was for the nature and extent of injuries caused by the automobile accident, and that pneumoconiosis was not among the suspected items.

The Claimant remains entitled to benefits under the Act.

The Board points out that in 1989 it ruled that benefits are not to be awarded during any period when it has been established that he is not totally disabled by pneumoconiosis. The non-qualifying ventilatory and blood gas studies on October 25, 1979 as interpreted by Dr. Kress establish that on that date the Claimant was not totally disabled, and, thus, under the Board's ruling not en-

titled to benefits. The first evidence to support a finding of total disability in this case was the ventilatory test results on January 5, 1982. There is no evidence as to when between October 25, 1979 and January 5, 1982 the Claimant became totally disabled. There being no specific evidence, the Claimant must be awarded benefits under the Board's recent ruling from immediately after the non-qualifying tests on October 25, 1979.

The original Decision and Order in this case is hereby amended to show that the payment of benefits should commence in the month of October, 1979.

/s/ Charles P. Rippey
CHARLES P. RIPPEY
Administrative Law Judge
Voice Phone 202-653-5120
Fax 202-653-8682

Washington, D.C.
CPR:bdw

U.S. DEPARTMENT OF LABOR
BENEFITS REVIEW BOARD
1111 20th Street, N.W.
Washington, D.C. 20036

[SEAL]

BRB No. 86-2151 BLA

OWCP No. 292-32-6668

WAYNE H. MCANGUES,
Claimant-Respondent,

v.

THE YOUGHIOGHENY AND OHIO COAL COMPANY,
Employer-Petitioner,

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,
Party-in-Interest.

DECISION AND ORDER

[Filed May 31, 1990]

Appeal of the Supplemental Decision and Order Upon Remand of Charles P. Rippey, Administrative Law Judge, United States Department of Labor

Edmund A. Sargus, Jr. (Burech & Sargus), St. Clairsville, Ohio, for claimant.

John G. Paleudis (Hanlon, Duff & Paleudis Co., LPA), St. Clairsville, Ohio, for employer.

Before: SMITH, Chief Administrative Appeals Judge, DOLDER, Administrative Appeals Judge, and SHEA, Administrative Law Judge.*

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* Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended, in 1984, 33 U.S.C. § 921(b)(5) (Supp. V 1987).

PER CURIAM:

Employer appeals the Supplemental Decision and Order Upon Remand (80-BLA-8038) of Administrative Law Judge Charles P. Rippey awarding benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. § 901 *et seq.* (the Act).

This case is before the Board for a second time. In the original Decision and Order, the administrative law judge found that claimant had established invocation of the interim presumption pursuant to 20 C.F.R. § 727.203 (a)(1) and (a)(2), and that employer had failed to establish rebuttal of the presumption pursuant to 20 C.F.R. § 727.203(b). Accordingly, benefits were awarded and the administrative law judge subsequently, on reconsideration, found that the payment of benefits should commence from April 1978, the month claimant filed his application. Employer appealed, asserting, in relevant part, that the administrative law judge had erred in failing to find rebuttal pursuant to 20 C.F.R. § 727.203(b)(2) and (b)(3) and that he had erred in setting the commencement date. On appeal, the Board held that the administrative law judge erred in rejecting the medical report of Dr. Kress as being contrary to the Act, and remanded the case for reconsideration of the evidence pursuant to subsections (b)(2) and (b)(3).[1] The Board also held that on remand the administrative law judge must reconsider the entitlement date in the event benefits are again awarded, inasmuch as the administrative law judge did not discuss all the medical evidence relevant to the onset date.

In his Supplemental Decision and Order Upon Remand (Decision and Order), the administrative law judge again found the evidence insufficient to establish rebuttal under

[1] The administrative law judge's finding of invocation of the interim presumption pursuant to subsection (a)(1) was affirmed and thus, is not at issue.

either subsection (b)(2) or (b)(3) and reiterated his finding of April 1978, as the date of entitlement. This appeal followed. Employer contends that the administrative law judge erred in failing to find rebuttal pursuant to subsection (b)(3) and failed to followed the Board's order to consider all of the medical evidence in determining the date on which benefits are to commence. Claimant responds that employer's arguments should be rejected, that the administrative law judge correctly found that the evidence failed to establish rebuttal pursuant to subsection (b)(3) and properly determined the entitlement date for benefits. The Director, Office of Workers' Compensation Programs, chose not to participate in this appeal.[2]

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. § 921(b)(3), as incorporated by 30 U.S.C. § 932 (a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In finding the evidence insuffiicent to establish rebuttal, the administrative law judge first emphasized that Dr. Tipton's 1982 qualifying ventilatory studies are sufficient alone to support a finding of total disability within the meaning of the Act. Based on Dr. Tipton's medical report, the administrative law judge also concluded:

> It is clear that in Dr. Tipton's view this disability is in significant part due to the Claimant's pneumo-

---

[2] While employer also contends that under a correct interpretation of subsection (b)(2), the evidence is sufficient to establish rebuttal under that subsection as well, employer acknowledges that claimant is totally disabled from a 1976 automobile accident, thus, employer concedes that in light of the decision of the controlling judicial circuit in *York v. Benefits Review Board*, 819 F.2d 134, 10 BLR 2-99 (6th Cir. 1987), rebuttal under subsection (b)(2) is precluded. Reply Brief at 2-3. We must agree and therefore, affirm the finding. *See Short v. Westmoreland Coal Co.*, 10 BLR 1-127 (1987); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

> coniosis, and that the consequences of the Claimant's automobile accident are not a significant factor in his conclusion.

Decision and Order at 1. The administrative law judge then discussed Dr. Kress' 1979 report and 1982 deposition testimony and letter, noting Dr. Kress' contrary opinion that claimant was not disabled from a pulmonary standpoint. Relevant to subsection (b)(3), Dr. Kress also concluded:

> . . . [claimant] does demonstrate evidence of coal workers' pneumoconiosis, occupationally acquired, but he does not present with any evidence to indicate any disability or impairment as a result of this pneumoconiosis and his former coal mine employment. I do believe he is disabled but this disability is due entirely to residuals from a severe head injury sustained in an auto accident.

Director's Exhibit 22. Dr. Kress was dubious of the ventilatory tests and results obtained by Dr. Tipton because it was his opinion that the drop in performance levels shown between 1979 and 1982 far exceeded a natural progression of chronic obstructive pulmonary disease. Dr. Kress suspected that claimant had an acute respiratory/bronchial infection at the time of the examination, as the only possible explanation for the apparent difference, and stated that Dr. Tipton's description of abnormal physical signs suggested such an acute infection. The administrative law judge was unpersuaded by Dr. Kress' explanation and disagreed that Dr. Tipton's report revealed any observations indicating an acute bronchial infection. Further, the administrative law judge stated:

> The rate at which pulmonary function descends in penumoconiosis is subject ot wide variations and is a very individual matter.

Decision and Order at 3. The administrative law judge also found that Dr. Kress improperly drew his conclu-

sion regarding disability from the classification of an x-ray film. In conclusion, the administrative law judge held:

> In this instance, I accept Dr. Tipton's ventilatory test results over Dr. Kress' speculations, and particularly so in this case because Dr. Kress inaccurately described statements he attributed to Dr. Tipton, and because of his expressed strong doubt that anyone with category 1 pneumoconiosis, could be totally disabled as a basis for his conclusion.

Decision and Order at 3.

Employer argues that the administrative law judge erroneously relied solely on Dr. Tipton's qualifying pulmonary function results to find rebuttal precluded and misrepresented Dr. Tipton's report. Employer also contends that the administrative law judge impermissibly rejected Dr. Kress' opinion concerning the 1982 ventilatory results and discredited Dr. Kress on a basis the Board previously held was improper. Finally, employer argues that the administrative law judge failed to address all the evidence relevant to the source of claimant's disability, including medical treatment records following the 1976 accident.

In order to establish rebuttal pursuant to subsection (b)(3), employer must prove that pneumoconiosis played *no part* in causing the miner's disability. Where pneumoconiosis is a contributing cause to a miner's disability, he is conclusively entitled to benefits. *See Saginaw Mining Co. v. Ferda*, 879 F.2d 198, 12 BLR 2-376 (6th Cir. 1989); *Tennessee Consolidated Coal Co. v. Crisp*, 866 F.2d 179, 12 BLR 2-121 (6th Cir. 1989); *Gibas v. Saginaw Mining Co.*, 748 F.2d 1112, 7 BLR 2-53 (6th Cir. 1984); *Borgeson v. Kaiser Steel Corp.*, 12 BLR 1-169 (1989). It thus appears that Dr. Kress' opinion, if fully credited, could establish rebuttal under subsection (b)(3). Because we conclude that the administrative law judge has not provided a valid reason for rejecting the

opinion of Dr. Kress, we must remand this case for reconsideration pursuant to subsection (b)(3). While an administrative law judge is not required to accept the opinion of any particular medical witness or expert, he must provide a rational basis for his weighing of the conflicting evidence and his determinations of relative credibility. *See Crisp, supra*; *Peabody Coal Co. v. Benefits Review Board*, 560 F.2d 797, 802 (7th Cir. 1977); *Calfee v. Director, OWCP*, 8 BLR 1-7, 1-10 (1985).

First, in his original decision the administrative law judge also rejected Dr. Kress' opinion as being contrary to the Act. Employer challenged this finding on appeal and the Board specifically held that because the opinion does not foreclose the possibility that simple pneumoconiosis may be totally disabling in some cases, the opinion is not contrary to the spirit and intent of the Act. We reaffirm that holding. *Cunningham v. Pittsburgh and Midway Coal Co.*, 7 BLR 1-93 (1984); *see Ham v. Bethlehem Mines Corp.*, 8 BLR 1-3 (1985). The administrative law judge emphasizes Dr. Kress' statements that:

> Another consideration in my opinion is the fact that this man demonstrates radiographically [sic.] evidence of only very minimal early pneumoconiosis. Such a level of pneumoconiosis is not expected to cause chronic obstructive lung disease.

Decision and Order at 3. However, as the Board previously noted, Dr. Kress' opinion was based on a physical examination, ventilatory and blood gas study evidence, in addition to his x-ray findings.

The administrative law judge also presumably credited Dr. Tipton's opinion over Dr. Kress' opinion on the basis of Dr. Tipton's qualifying ventilatory test results, because "Dr. Kress inaccurately described statements he attributed to Dr. Tipton." Decision and Order at 3. Initially, we note that ventilatory test results are generally irrelevant to the injury at subsection (b)(3), which concerns the

cause of impairment. *Piniansky v. Director, OWCP*, 7 BLR 1-171, 1-174 (1984). However, they may be relevant in a case such as the instant one, where there is conflicting evidence concerning the existence of *any respiratory* disability. *Id.*; *cf. Morgan v. Bethlehem Steel Corp.*, 7 BLR 1-226 (1984). Nevertheless, as employer argues, the Board also previously pointed out that rebuttal in this case is not precluded merely because of the qualifying nature of the most recent ventilatory test of record, citing *Kertesz v. Crescent Hills Coal Co.*, 8 BLR 1-112 (1985), *aff'd*, 788 F.2d 158, 9 BLR 2-1 (3d Cir. 1986); *see also Merashoff v. Consolidation Coal Co.*, 8 BLR 1-105 (1985); *Strunk v. Monarch Coal Inc.*, 7 BLR 1-49 (1984). Further, regardless of whether Dr. Kress, in discrediting Dr. Tipton's ventilatory study, inaccurately described the doctor's physical findings, this alone does not constitute an independent adequate rationale for rejecting Dr. Kress' overall opinion.[3]

Employer also contends that the administrative law judge failed to consider treatment records following claimant's 1976 accident which employer maintains are relevant in that they support an inference of no pulmonary impairment. While this evidence alone may be insufficient to carry employer's burden, *see, e.g., Crisp, supra*, we cannot say it is irrelevant. Since the administrative law judge did not mention the treatment records, on remand the administrative law judge should consider the probative value, if any, of this evidence.

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[3] While we agree that the administrative law judge's general statement regarding the rate at which pulmonary function descends in pneumoconiosis may have been inappropriate, the administrative law judge is not required, as employer asserts, to accept Dr. Kress' opinion that Dr. Tipton's study is invalid. *Blackledge v. Director, OWCP*, 6 BLR 1-1060 (1984); *cf. Siegel v. Director, OWCP*, 8 BLR 1-156 (1985). Moreover, the United States Court of Appeals for the Sixth Circuit has rejected employer's argument that an administrative law judge must resolve all questions regarding the validity of pulmonary function studies considered at rebuttal. *Ferda, supra*, 879 F.2d at 206, 12 BLR at 2-387.

Finally, employer argues that the administrative law judge drew an improper inference from Dr. Tipton's report. Dr. Tipton concluded:

> Thus, Mr. McAngues has developed simple coal workers pneumoconiosis in association with the severe chronic obstructive pulmonary disease. Obviously, the coal workers pneumoconiosis is [a] consequence of his prolonged coal mine exposure. Based on the studies and the history and the examination, it is my opinion that Mr. McAngues is disabled regarding gainful coal mine employment.

Claimant's Exhibit 1. We conclude that the administrative law judge could reasonably find Dr. Tipton's report supportive of a finding that claimant's disability was due in some part to his coal mine employment, *see generally Zimmerman v. Director, OWCP*, 871 F.2d 564, 567, 12 BLR 2-254, 2-258 (6th Cir. 1989); *Peabody, supra.* We need not further address the arguments in this context because under subsection (b)(3), employer, not claimant, bears the burden of proof. *Gibas, supra.* On remand, however, the administrative law judge must reconsider the conflicting opinions of Drs. Kress and Tipton specifically regarding the cause of claimant's disability, under the proper legal standard and in light of their underlying documentation and all other relevant evidence of record, and explain his rationale for resolving the conflict. *See Crisp, supra; Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983).[4]

Employer also contends that the administrative law judge failed to follow the Board's remand order to consider whether the medical evidence as a whole establishes

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[4] If on remand the administrative law judge finds no entitlement under 20 C.F.R. Part 727, then he must consider claimant's eligibility under Part 718, *see Knuckles v. Director, OWCP*, 869 F.2d 996, 12 BLR 2-217 (6th Cir. 1989), but need not consider 20 C.F.R. § 410.490, *see The Youghiogheny and Ohio Coal Co., v. Milliken*, 866 F.2d 195, 12 BLR 2-136 (6th Cir. 1989).

the month of onset of total disability. Employer argues that the Board mandated the administrative law judge to apply *Stumfoll v. Director, OWCP*, 7 BLR 1-566 (1984), and that the administrative law judge erred in distinguishing it on the facts of this case. Employer also relies on *Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 12 BLR 2-178 (3d Cir. 1989) and maintains that if the administrative law judge's findings on the merits of this claim were to be upheld, then the date of entitlement should not go back further than the date of Dr. Kress' examination, October 1979, when claimant was shown not to have any total disability due to pneumoconiosis.

The Board did not direct the administrative law judge to apply the holding of *Stumfoll* but rather, held that on remand the administrative law judge must consider all the medical evidence as a whole. However, in light of the Board's recent decision in *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989), the administrative law judge's finding must be vacated. The administrative law judge found that the January 1982 report of Dr. Tipton was the first acceptable evidence of total disability and that the objective evidence developed by Dr. Kress in 1979 showed that claimant was not at that time totally disabled. The administrative law judge stated:

> In this case there would be a basis for concluding that the Claimant became totally disabled sometime between the two examinations, but that does not furnish a basis for concluding what year, let alone what month, the Claimant became totally disabled. The regulations on this subject are unequivocal.

Decision and Order at 4. Inasmuch as the administrative law judge has apparently credited the evidence that claimant was *not* totally disabled in 1979 and it appears that no contradictory evidence on this issue was presented prior to 1982, we conclude that the administrative law judge, as trier-of-fact, must reconsider the commencement date on remand in the event claimant is found entitled to benefits. *See Krecota, supra; Lykins, supra.*

Accordingly, the administrative law judge's Supplemental Decision and Order Upon Remand is affirmed in part and vacated in part and the case is remanded for reconsideration consistent with this opinion.

SO ORDERED.

/s/ Roy P. Smith
ROY P. SMITH, Chief
Administrative Appeals Judge

/s/ Nancy S. Dolder
NANCY S. DOLDER
Administrative Appeals Judge

/s/ Robert J. Shea
ROBERT J. SHEA
Administrative Law Judge

Dated this 31st day of May 1990.

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
1111 20th Street, N.W.
Washington, D.C. 20036

[SEAL]

Date Issued: July 24, 1986

Case No. 80-BLA-8038

OWCP No. 292-32-6668

BRB No. 83-131 BLA

IN THE MATTER OF

WAYNE H. MCANGUES,
Claimant,

v.

YOUGHIOGHENY & OHIO COAL COMPANY,
Employer,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-In-Interest,

ERRATA

On the Supplemental Decision and Order issued on July 22, 1986 the case number erroneously read 80-BLA-8083, it should read 80-BLA-8038.

/s/ Charles P. Rippey
CHARLES P. RIPPEY
Administrative Law Judge

Washington, D.C.
CPR: 126-15

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
1111 20th Street, N.W.
Washington, D.C. 20036

[SEAL]

Date Issued: July 22, 1986

Case No. 80-BLA-8083

OWCP No. 292-32-6668

BRB No. 83-131 BLA

IN THE MATTER OF
WAYNE H. MCANGUES,
Claimant,

v.

YOUGHIOGHENY & OHIO COAL COMPANY,
Employer,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-In-Interest.

SUPPLEMENTAL DECISION AND ORDER UPON REMAND

The Benefits Review Board remanded this case for reconsideration of possible rebuttal of the so-called interim presumption pursuant to §§ 727.203(b)(1) and (2) of the regulations.

Dr. Jon P. Tipton, reporting on an examination conducted January 5, 1982, states that the results of ventilatory studies revealed an FEV_1 result of 1.61 Liters and an MVV test result of 36 Liters per minute. These re-

sults are qualifying under § 727.203(a)(2) of the regulations to support, by themselves, a finding of total disability within the meaning of the Act. In addition, Dr. Tipton stated his conclusion that the Claimant was disabled regarding gainful coal mine employment. It is clear that in Dr. Tipton's view this disability is in significant part due to the Claimant's pneumoconiosis, and that the consequences of the Claimant's automobile accident are not a significant factor in his conclusion.[1]

In a report dated November 1, 1979 and discussed in a deposition taken on March 2, 1982, Dr. George O. Kress found that the Claimant was not disabled from a pulmonary standpoint based upon a medical examination and non-qualifying ventilatory studies performed in 1979, and examination of earlier evidence.

In a letter dated March 9, 1982, Dr. Kress discusses Dr. Tipton's report of his January 2, 1982 examination and testing. Dr. Kress mentions that there is no indication of the paper speed when the spirometric tracings were taken. The regulations at § 410.430 state that the paper speed to record the FEV_1 should be at least 20 millimeters per second. There is no requirement that a statement as to paper speed must be made in the report. It is apparent from examination of that section that some of the elements were set forth with the mandatory "must" and some with the permissive "should". Dr. Kress makes only a passing reference to the fact that the paper speed was not recorded and it is apparent from the remainder of his discussion that he accepted the results as valid for the Claimant at the time he took the test. In view of the factors just discussed, I find that the January 2, 1982 ventilatory test results are not required to be rejected by the regulations because of failure to state the paper speed

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[1] The Employer must establish that the disability did not arise in whole or in part due to the claimant's pneumoconiosis in order to rebut the presumption under § 727.203(b)(3) of the regulations. Bethlehem Mines Corporation v. Massey, No. 83-2130 (4th Cir. June 5, 1984) (reversing the previously held position of the Benefits Review Board)

used in producing the spirometric tracings, and that there is no evidence in this record that failure to failure to state the paper speed in this instance is a basis for discounting the test results. Because the claim in this case was filed prior to the effective date of the Part 718 regulations, they are not applicable to this case.

Through underlining in his brief the Employer appears to be of the view that cooperation was not indicated regarding the ventilatory tests taken on January 5, 1982. A note on the spirometric tracings indicates that the cooperation was good.

In his letter of March 9, 1982, Dr. Kress states that because in his view the drop in the performance levels on the ventilatory tests between 1979 and 1982 "far exceeds what is recognized as can be expected in the natural progression of chronic obstructive pulmonary disease" he suspects that the Claimant must have had an acute respiratory infection at the time of Dr. Tipton's examination. He states that individuals with chronic obstructive pulmonary disease during the course of an acute exacerbation of infection will have a significant reduction in their function studies temporarily as a result of the infection. This is undoubtedly a sound statement.

Dr. Kress states, "The description of abnormal physical signs noted by Dr. Tipton would also suggest that this man was experiencing an acute bronchial infection at the time of his examination and again this is the only possible explanation for the apparent difference in results obtained in the two ventilatory studies over and above again the normally expected loss with the passage of time." A careful examination of Dr. Tipton's January 27, 1982 letter fails to reveal any observations by Dr. Tipton which which indicate that the Claimant was experiencing an acute bronchial infection when the test was made.

In addition, Dr. Kress states:

> "Another consideration in my opinion is the fact that this man demonstrates radiographically [sic.] evidence of only very minimal early pneumoconiosis. Such a level of pneumoconiosis is not expected to cause

> chronic obstructive lung disease. It would not, therefore, be of the opinion that his chronic obstructive pulmonary disease is in any way related to his early simple coal workers' pneumoconiosis."

It has been held repeatedly that it is improper to draw conclusions regarding disability from the classification of an X-ray film which is positive for pneumoconiosis. The fact that the X-ray evidence is category 1 is not a proper reason for discrediting evidence of pulmonary insufficiency, or concluding that a claimant's pulmonary deficit is not caused by his coal mine employment. Rebuttal under § 727.203(b)(3) has not been established in this case.

The rate at which pulmonary function descends in pneumoconiosis is subject to wide variations and is a very individual matter. In this instance, I accept Dr. Tipton's ventilatory test results over Dr. Kress' speculations, and particularly so in this case because Dr. Kress inaccurately described statements he attributed to Dr. Tipton, and because of his expressed strong doubt that anyone with category 1 pneumoconiosis, could be totally disabled as a basis for his conclusion.

The conclusion of the Decision and Order that the interim presumption had not been rebutted pursuant to §§ 727.302(b)(2) and (3) is reaffirmed.

Considering all the medical evidence in the record, it is true that the first acceptable evidence of total disability, within the meaning of the Act, is the report of Dr. Tipton in January of 1982. The objective evidence developed by Dr. Kress in 1979 was that the Claimant was not at that time totally disabled. However, that is not sufficient ground upon which to award benefits only from January, 1982. Sec. 725.503(b) of the regulations state:

> "Where the evidence does not establish the month of onset, benefits shall be payable to such miner beginning with the month during which the claim was filed . . ."

In this case there would be a basis for concluding that the Claimant became totally disabled sometime between the two examinations, but that does not furnish a basis for concluding what year, let alone what month, the Claimant became totally disabled. The regulations on this subject are unequivocal. Where the *month* in which disability cannot be determined to have started cannot be determined, benefits are to begin with the month during which the claim was filed.

This case is clearly distinguishable from *Stumfol,* cited in the Benefits Review Board's Decision and Order remanding this this matter for reconsideration. In *Stumfol* the examination which concluded there was total disability followed only three and four months prior to two examinations which did not find total disability. No such clear picture establishing the time of disability is presented in this case.

As to whether the date of application should be April 17, 1978 or June 4, 1978, receipt by the Social Security Administration acting as agent for the Department of Labor is a filing for purposes of the Act, and in such cases actual receipt by the Department of Labor is without significance regarding the date of filing. Benefits in this case should commence with the month of April, 1978, in accordance with my previous order.

/s/ Charles P. Rippey
CHARLES P. RIPPEY
Administrative Law Judge

CPR: 126-15
Washington, D.C.

NOTICE OF APPEAL RIGHTS: Any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within 30 days from the date of this Decision, by filing a Notice of Appeal with the Benefits Review Board, 1111 20th Street, N.W., Suite 757, Washington, D.C. 20036.

U.S. DEPARTMENT OF LABOR
BENEFITS REVIEW BOARD
1111 20th St., N.W.
Washington, D.C. 20036

[SEAL]

BRB No. 83-131 BLA

OWCP No. 292-32-6668

WAYNE H. MCANGUES,
Claimant-Respondent,

v.

THE YOUGHIOGHENY and OHIO COAL COMPANY,
Employer-Petitioner,

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,
Party-in-Interest.

Appeal of the Decision and Order and Decision on Motion for Reconsideration of Charles P. Rippey, Administrative Law Judge, United States Department of Labor

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DECISION and ORDER

Edmund A. Sargus, Jr. (Bureck & Sargus), St. Clairsville, Ohio, for claimant.

John G. Paleudis (Kinder, Kinder & Hanlon), St. Clairsville, Ohio, for employer.

Before: SMITH and DOLDER, Administrative Appeals Judges, and DeGREGORIO, Administrative Law Judge.*

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* Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C.A. § 921(b)(5) (West 1986).

PER CURIAM:

Employer appeals the Decision and Order and Decision on Motion for Reconsideration (80-BLA-8038) of Administrative Law Judge Charles P. Rippey awarding benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. § 901 *et seq.* (the Act).

The administrative law judge found that the evidence of record was sufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. § 727.203(a)(1) and (2), but insufficient to rebut the same pursuant to 20 C.F.R. § 727.203(b)(1)-(4). Accordingly, benefits were awarded. Employer contends on appeal that the administrative law judge erred in applying the interim presumption and in not finding rebuttal pursuant to subsections (b)(2) and (3). It also argues that even if the Board affirms the award of benefits, the administrative law judge erred in setting April 1978, the date of claimant's application for benefits, as the entitlement date.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. § 921(b)(3), as incorporated by 30 U.S.C. § 932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

First, we reject employer's argument that subsection (a)(1) of Section 727.203, in creating a presumption of disability based upon a finding of simple pneumoconiosis, exceeds the statutory grant given to the Secretary of Labor under the Act. *Kaiser Steel Corp. v. Director, OWCP*, 757 F.2d 1078, 7 BLR 2-50 (1985); *Alabama By-Products Corp. v. Killingsworth*, 733 F.2d 1151, 6 BLR 2-59 (1984); *Jones v. The New River Co.*, 3 BLR 1-199 (1981). We also reject employer's argument that 20 C.F.R. Part 727 is unconstitutionally restrictive of evi-

dence which can be used to rebut the interim presumption. *See Wilson v. The Youghiogheny and Ohio Coal Co.*, 8 BLR 1-73 (1985).

Employer next advances several arguments concerning the sufficiency of the evidence of record to invoke the interim presumption pursuant to subsection (a)(2) of Section 727.203. Since, however, employer advances no specific challenge to invocation under subsection (a)(1), apart from the constitutional challenge which we rejected, *supra*, it is unnecessary to address its arguments relating to subsection (a)(2). *See Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985).

With respect to the administrative law judge's finding of rebuttal under subsections (b)(2) and (b)(3), employer correctly argues that the administrative law judge erred by discrediting Dr. Kress' opinion as being contrary to the Act. Dr. Kress concluded that simple pneumoconiosis does not cause chronic obstructive pulmonary disease and is rarely, if ever, totally disabling.[1] This opinion does not foreclose the possibility that simple pneumoconiosis may be totally disabling in some cases and is therefore not contrary to the spirit and intent of the Act. *See Stephens v. Bethlehem Mines Corp.*, 8 BLR 1-350 (1985); *Cunningham v. Pittsburg and Midway Coal Co.*, 7 BLR 1-93 (1984). Accordingly, we vacate the administrative law judge's finding that the evidence of record was insufficient to establish rebuttal under subsections (b)(2) and (3) and remand the case for reconsideration.[2] Rebuttal pursuant to these subsections is not, con-

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[1] Dr. Kress' opinion that claimant is not totally disabled due to coal workers' pneumoconiosis was based on a physical examination and x-ray, ventilatory and blood gas study evidence. Dir. Ex. 22; Emp. Ex. 4; Depo. of Dr. Kress at 26.

[2] Employer also correctly argues that rebuttal in this case is not precluded merely because of the qualifying nature of the most recent ventilatory test of record. *See Kertesz v. Crescent Hills Coal Co.*, 8 BLR 1-112 (1983). We reject, however, employer's argument

trary to employer's assertion, established as a matter of law, since the record contains evidence, which, if credited, could preclude rebuttal under these subsections. *See* Cl. Ex. 1; *Puleo v. Florence Mining Co.*, 8 BLR 1-198, 1-199 (1985); *Shaw v. Bradford Coal Co.*, 7 BLR 1-462 (1984). *See also Borgeson v. Kaiser Steel Corp.*, 8 BLR 1-132 (1985).

Finally, employer argues that the administrative law judge erred in setting April 1978, the date the claim was filed, as the date of the onset of benefits. On remand, if the administrative law judge again finds entitlement to benefits, he must determine whether the medical evidence as a whole (including the medical reports of record) establishes the month of onset of total disability. *See* Cl. Ex. 1; Emp. Ex. 4; Dir. Ex. 10, 22. *See generally Stumfoll v. Director, OWCP*, 7 BLR 1-566 (1984). The administrative law judge in his Decision on The Motion for Reconsideration as to onset date considered only the ventilatory studies in the record.

Accordingly, the Decision and Order and the Decision and Order on Motion For Reconsideration are vacated and the case is remanded for reconsideration of rebuttal pursuant to subsections (b)(2) and (3) in a manner consistent with this opinion.

SO ORDERED.

/s/ Roy P. Smith
ROY P. SMITH
Administrative Appeals Judge

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that even without consideration of Dr. Kress' opinion under subsection (b)(3), the record nevertheless establishes no total disability due to coal mine employment. The evidence employer cites in support of this argument does not affirmatively establish that claimant's disability did not arise out of coal mine employment. *See Tinch v. Director, OWCP*, 6 BLR 1-1284 (1984).

/s/ Nancy S. Dolder
NANCY S. DOLDER
Administrative Appeals Judge

/s/ Nicodemo DeGregorio
NICODEMO DEGREGORIO
Administrative Law Judge

Dated this 2nd
day of May 1986

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
1111 20th St., N.W.
Washington, D.C. 20036

[SEAL]

Date August 23, 1982

Case No. 80-BLA-8038

OWCP No. 292-32-6668

IN THE MATTER OF

WAYNE H. MCANGUES,
Claimant,

v.

YOUGHIOGHENY AND OHIO COAL CO.,
Employer,

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest.

EDMUND A. SARGUS, ESQ.
For the Claimant

JOHN G. PALEUDIS, ESQ.
For the Employer

BEFORE: CHARLES P. RIPPEY
Administrative Law Judge

DECISION AND ORDER—AWARDING BENEFITS

This Decision and Order approves the claims of Wayne H. McAngues for benefits under the Black Lung Benefits

Act, as amended, 30 U.S.C. § 901 *et seq.*, (hereinafter referred to as "the Act") and the regulations promulgated thereunder and found at Title 20, Code of Federal Regulations on the ground that the claimant is totally disabled within the meaning of the Act due to pneumoconiosis. Pneumoconiosis is defined in the Act as a chronic dust disease of the lungs and its sequelae, including respiratory and pulmonary impairments arising out of coal mine employment and is commonly known as black lung.

A hearing was held in Wheeling, West Virginia on March 23, 1982 at which the claimant was present and all parties except the Director were represented by counsel.

The parties agreed at the hearing to the admission of the posthearing rereading by Dr. George Kress, a B reader, of the X-ray taken January 5, 1982. That rereading and accompanying report are hereby admitted as Employer's Exhibit 6. At the hearing the employer also agreed that the claimant had worked in excess of 10 years of coal mine employment. (T-32, D-23).[1] I find the evidence of record demonstrates that claimant worked as a miner for 10½ years. (D-3, 4). It must now be determined whether the medical evidence of record satisfies any of the medical requirements of § 727.203(a)(1-4) of the regulations for invocation of the interim presumption of total disability due to pneumoconiosis.

I find the X-ray evidence as a whole does provide a basis for invocation of the presumption under § 727.203 (a)(1). There are several X-rays of record providing conflicting results. All but one of the X-rays that are negative as to the existence of pneumoconiosis were taken in 1976. (D-13). The remaining negative X-ray report is a rereading by Dr. C.L. Anderson a "B" reader of the

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[1] All references to the Transcript, Director's Exhibits, Employer's Exhibits and Claimant's Exhibits shall be designated T, D, E, C, respectively.

film taken on August 20, 1979. (E-3). This same film, however was originally read as positive for pneumoconiosis by a board-certified radiologist and subsequently reread as positive by a B-reader, Dr. Reginald Greene. (D-14, 15). Moreover the most recent X-ray taken on January 5, 1982 was also read as positive for pneumoconiosis by another board-certified radiologist and by a B-reader. (C-1, E-6). Based on the fact that pneumoconiosis is a progressive disease as recognized in *Depka v. Director, OWCP*, 2 BLR1-388 (1979), I give greater weight to the most recent X-ray evidence which is positive for pneumoconiosis.

I now turn to the question of rebuttal of the presumption as outlined under § 727.203(b)(1-4) of the regulations. Rebuttal under subsection (b)(4) is unavailable here since the presumption was invoked under § 727.203 (a)(1). *Justice v. Jewell Ridge Coal Corp.*, 3 BLR 1-547 (1981). Nor does the evidence support rebuttal under subsection (b)(1) in the instant claim.

As to possible rebuttal under subsection (b)(2) there are two ventilatory studies of record, which are nonqualifying. (D-10, 22). The third study conducted by Dr. Tipton on January 5, 1982 produced values well within the levels required for invocation of the presumption of total disability. This study was taken more than 2 years later than the earlier nonqualifying ventilatory studies. Resolution of this ventilatory evidence of record provides an alternative basis for invocation of the presumption since I give greater weight to the most recent study which is the best indicator of claimant's current breathing capacity. That study does satisfy the quality standards of § 410.430; the requisite tracings are included and the statement of good cooperation satisfies the requirement of a statement as to claimant's understanding. *Strako v. Ziegler Coal Co.*, 3 BLR 1-136 (1981). It should be noted that § 410.430 does not require a separate statement as to the paper speed. Thus on the basis of this

ventilatory evidence, I find the claimant does have a totally disabling respiratory impairment and that rebuttal under (b)(2) is not established.

In so finding, I note that the nonqualifying blood gas studies of record which are a measure of a different lung function in and of themselves are not sufficient to rebut the presumption. (D-11, 22, C-1). Nor do I accept the opinion of Dr. George Kress that the claimant does not have a totally disabling respiratory impairment. Dr. Kress states that the decreased values of the ventilatory study conducted by Dr. Tipton do not reflect the natural progression of chronic pulmonary disease. Dr. Kress however, states in his deposition that he does not expect any changes in claimant's pneumoconiosis since the X-ray evidence demonstrates the claimant has only very early simple pneumoconiosis. As stated earlier, pneumoconiosis has been found to be a progressive disease. *Depka, supra.* Dr. Kress also concludes that the claimant must have had a respiratory infection at the time of taking the most recent ventilatory study. There is no mention by Dr. Tipton of an acute respiratory infection and the claimant stated at the hearing which was only two months after this study that he had no infection at that time, which testimony I accept. (T-20). Dr. Kress reiterates in his reports that a consideration in his opinion in explaining the decreased values and his diagnosis is that the claimant demonstrates radiographic evidence only of early pneumoconiosis. (E-4, E-6). It is apparent from these reports that Dr. Kress is correlating the degree of pneumoconiosis as revealed by X-ray with the degree of respiratory impairment due to pneumoconiosis. Additionally, Dr. Kress concludes that simple pneumoconiosis is not expected to cause chronic obstructive pulmonary disease, (E-4) and is rarely, if ever, totally disabling. (E-1 at 36).

These statements are tantamount to a rejection of the Act and the regulations which recognize that simple pneumoconiosis may be totalling disabling. In view of the

above discussion, Dr. Kress's opinion is rejected. It is noteworthy in this regard that Dr. Tipton concludes in his report that the claimant does have severe chronic pulmonary disease. (C-1).

In view of the rejection of the opinion of Dr. Kress, there is insufficient evidence for possible rebuttal under subsection (b)(3) as well. Thus, I find the claimant is entitled to benefits under the Act which benefits are to commence as of June, 1978, the date claimant filed his application. The periodic payments are to be augmented by reason of claimant's wife, Charlotte and son, Wayne. (7,9). Although, the augmentation of benefits due to Wayne must end as of March, 1981 when he no longer was a dependent as defined in § 725.209 of the regulations since he had reached 18 years of age and was not a full time student. (T-10). § 725.210.

Counsel for the claimant submitted his request for attorney's fees in the amount of $877.93. The employer has raised no objection to the fee request. I find the fee request reasonable in light of the services required in the handling of this matter.

ORDER

The Youghiogheny and Ohio Coal Company is hereby ordered to:

1. Pay to the claimant all periodic benefits to which he is entitled under the Act, augmented by reason of his wife and son the terms for such augmentation described above, commencing June, 1978.

2. Pay for or reimburse the claimant for all medical and hospitalization benefits arising out of his pneumoconiosis to which he is entitled under the Act.

3. Pay to Edmund A. Sargus, Esq., the sum of $877.93 for his representation serices.

4. Reimburse the Secretary of Labor fcr any payments under the Act he has made to the claimant and deduct

such amounts from the amounts ordered to be paid under paragraph 1 above.

5. Pay to the claimant or to the Secretary of Labor, as appropriate, interest at the rate of 6 percent prior to December 31, 1981 and thereafter at the rate specified in the 1981 Amendments to the Act from September 24, 1979 at which time the employer was notified of his designation as the Responsible Operator until the date of actual payments of benefits.

/s/ Charles P. Rippey
CHARLES P. RIPPEY
Administrative Law Judges

CPR/MR

EXAMINING ADDRESS
51 SOUTH SOUDER
COLUMBUS, OHIO 43222
614-464-3506

CORRESPONDENCE-BILLING
144 CAMPUS VIEW BLVD.
WORTHINGTON, OHIO 43085
614-885-0845

GEO. O. KRESS, M.D. Inc.

March 9, 1982

Mr. John Paleudis
Attorney at Law
Kinder, Kinder & Hanlon
185 W. Main Street
St. Clairsville, Ohio 43950

Re: Wayne H. McAngues
SS #292-32-6668

Dear Mr. Paleudis:

As you know, we had examined this gentleman on 10-25-79 and have reported to you previously regarding our findings in a report dated 11-1-79. He became disabled on 4-10-78 following an auto accident which left him with a right-sided paralysis. He had some eleven years of underground coal mining employment at the time of this accident and had respiratory symptoms consisting of a productive cough, dyspnea on little exertion. In essence we found no abnormalities insofar as physical examination of the chest was concerned and his ventilatory function studies revealed no significant impairment. Resting arterial blood gas studies were normal. We interpreted his chest x-ray as showing early, simple pneumoconiosis.

You have now submitted a copy of an examination report by Dr. Tipton who apparently examined this gentleman on 1-5-82. He describes in some detail his work history which quite clearly indicates that this man did work at underground mining in what would be considered rather heavy work with significant exposure to dust. His respiratory symptoms were essentially as previously described to us. On physical examination Dr.

Tipton describes decreased breath sound with what he calls sonorous and sibilant expiratory rhonchi with some snores inspiratory rhonchi present. He reported a resting arterial blood gas with a PCO_2 30.7 PO_2 74.8, which is not abnormal. On ventilatory function studies he reports a vital capacity of 2.64, FEC_1 1.61 and MVV 36. A chest x-ray was interpreted as showing some fine nodular densities in both lungs, most probably on the basis of pneumoconiosis although no classification of these changes was given. Dr. Tipton concluded that this man had simple coal workers' pneumoconiosis with associated chronic pulmonary disease, severe. He felt this man was disabled.

A copy of the ventilatory tracings was enclosed. I note that they listed his height as 68″ whereas when we examined him and measured him personally in his stocking feet he was 67″. The tracings sheet is somewhat patched together but they do appear to have matched the curves. There is no indication as to the paper speed. The forced vital capacity curves do appear to be smooth and uniform and to have reached a plateau. MVV tracings are somewhat irregular both as to rate of respiration and the height of the tidal volume. The results as recorded appear to be correct. The technician indicated that cooperation was good.

Without actually observing the patient perform on his pulmonary function studies, it is not possible for me to state whether, indeed, this January, 1982, function study did represent maximum effort. It is quite apparent that the results obtained are strikingly reduced from those we found some twenty-six months earlier. Indeed, the level of decrease in the parameters on his pulmonary function study far exceed what is recognized as can be expected in the natural progression of chronic obstructive pulmonary disease. Because of this excessive loss of function in this period of time, I would suspect that this man must have had a respiratory infection at the

time of Dr. Tipton's examination. It is, of course, recognized that individuals with chronic obstructive pulmonary disease during the course of an acute exacerbation of infection will have a significant reduction in their function studies temporarily as the result of this infection. The description of abnormal physical signs noted by Dr. Tipton would also suggest that this man was experiencing an acute bronchial infection at the time of his examination and again this is the only plausible explanation for the apparent difference in results obtained in the two ventilatory studies over and above again the normally expected loss with the passage of time. Testing an individual while he is experiencing an acute respiratory infection is not a valid way of determining what the underlying basic pulmonary function really is.

Another consideration in my opinion is the fact that this man demonstrates radiographically evidence of only very minimal early pneumoconiosis. Such a level of pneumoconoiosis is not expected to cause chronic obstructive lung disease. I would not, therefore, be of the opinion that his chronic obstructive pulmonary disease is in any way related to his early simple coal workers' pneumoconiosis. You have indicated that you are forwarding this recent chest x-ray for review and if it is received we will add our interpretation of this film and include it with this report.

Sincerely yours,

/s/ George O. Kress, M.D.
GEORGE O. KRESS, M.D.

GOK/mh
Encl.

EXAMINING ADDRESS
51 SOUTH SOUDER
COLUMBUS, OHIO 43222
614-464-3506

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GEO. O. KRESS, M.D. Inc.

May 13, 1982

Mr. John G. Paleudis
Attorney At Law
Kinder, Kinder & Hanlon
185 W. Main Street
St. Clairsville, Ohio 43950

Re: Wayne H. McAngues
The Youghiogheny and Ohio Coal Company
Case No. 80-BLA-8038
OWCP No: 292-32-6668

Dear Mr. Paleudis:

I received the x-rays taken on 1-5-82 at Marietta Memorial Hospital on this gentleman. They forwarded both the original and a copy. I agree the copy is totally unacceptable for interpretation. Actually the original film itself is not an ideal x-ray in that the lower half of the lung field is somewhat under-exposed and the upper half has evidence of light streaking. Nonetheless I did feel that it was adequate for interpretation and my B-reading is enclosed. You will note that I again feel there are probably very minimal changes which would be compatible with a diagnosis of pneumoconiosis as I had originally concluded from my own x-ray interpretations.

You also asked regarding disability related to his pneumoconiosis and whether the reading of this film in any way has altered my previous opinion as to impairment. I do not believe that considering all the information we have had available in the past that this man really has any impairment attributable to pneumoconiosis. In fact, I doubt if he has any pulmonary impairment. As you

know from my previous report, when we saw him in 1979 we found entirely normal blood gas studies and ventilatory function studies in view of the normal vital capacity and FEV_1. On a subsequent examination in January, 1982, Dr. Tipton reported a normal arterial blood gas but what seemed to be significantly reduced ventilatory results. As I have already indicated, the seeming loss in ventilatory function which occurred in this short interval of two years and three months is totally unrealistic as far exceeds anticipated loss in any patient with chronic lung disease. As I previously suggested, I think this man must have had some respiratory infection at the time Dr. Tipton examined him as the more plausible explanation for this seemingly markedly reduced ventilatory function study. I must say also that I would really question whether or not this man really performed with maximum effort on this January, 1982, study even though the technician indicated that cooperation was good. In view of the fact that he has at the most a very minimal degree of pneumoconiosis, that he had normal ventilatory function in October, 1979, normal arterial blood gas studies in October, 1979, and January, 1982. I do not believe that this man has evidence of any significant pulmonary or respiratory impairment due either to coal workers' pneumoconiosis or to his former coal mine employment. Should you have any further questions, please call.

Sincerely yours,

/s/ George O. Kress, M.D.
GEORGE O. KRESS, M.D.

GOK/mh
Encl.

THE TIPTON CLINIC
100 Front Street
Marietta, Ohio 45750

Allergy and Pulmonary Diseases

27 January 1982

Edward Sargus
Attorney at Law
116 W. Main Street
St. Clairsville, Ohio 43950

Re: Wayne H. McAngues
R.D.#2, Box 207
Dillonville, Ohio 43917
S.S. 292-32-6668
B.D. 8-17-39

Dear Mr. Sargus,

As you know, Mr. McAngues began working in the deep soft coal mines December 4, 1965 at the Y & O #2 Mine. He first worked as a roof bolter. He did that for about 3 years then was a buggy runner. He did that for about 1 and ½ years. Following that he was a face miner operator for two years. Following that, he was a stone miner operator for three years. After that he worked as a track man. In all he spent at least 11 years in the deep soft coal mines. He had to leave mining because of a car accident in which he sustained a head injury which caused partial paralysis of his right side. Following the accident, he was comatose for two weeks and gradually regained consciousness then slowly regained partial function of his right arm and leg. There was some disturbence of his balance and equilibrium which still bothers him at times.

Prior to entering soft coal mining, Mr. McAngues worked from 1962 until 1965 at the Mine and Tool

Manufacturing Company in Cadiz, Ohio. There his job involved sharpening mining bits. He wore a respirator at that work. He borrowed a respirator when he was roof bolting and also when he operated the stone miner. He states in those days he had to bolt behind the miner which made the work extremely dusty so that he couldn't hardly even see to do his work. He also makes mention the fact that when he was a stone mining operator it was before the new rules have been instituted which now require the men to work with the ventilation. When he worked they worked against the ventilation or at any possibly way and thus the exposure to the stone dust was much greater. He points out that while doing that, he worekd in the dust so thick that he couldn't even see his hands in front of him. He pointed out that he just had to feel his way to do his work. He said then he had to shut the miner down to be able to see what he had done. Working almost blind, he had to feel his way to operate the miner, at least part of the time. Mr. McAngues points out that he was starting to note shortness of breath about a year after he began working in the mines. He, of course, had been working as a roof bolter during that year. He coughed excessively and expectorated rather large amounts of gray and black colored mucous. He states that his nose filled up with dust and had to be cleared out from time to time. He apparently expectorated at least ½ a cup and possibly up to a cup or more of mucous per day during much of the time he worked in the mine.

Mr. McAngues points out that he was short of breath on climbing one flight of stairs by the time he had worked 5 years in the mines. By the time he had worked 11 years (before the accident) he was short of breath on climbing less than one flight of stairs. He noted some night sweats but has not had hemoptysis. After he was in the automobile accident and was in a rehabilitation phase, it took about six months until he stopped coughing up significant amounts of coal dust. The expectoration

seemingly dropped off to about ⅓ of a cup per day. There have been a moderate number of respiratory tract infections which have significantly impaired his breathing and have caused him to expectorate yellowish (semipurulent) mucous in association with wheezing and expectoration. There has been a gradually increasing problem with bronchospasm. He states he began noticing wheezing about three years before he was injured. He was told that x-rays taken at the Martins Ferry Hospital demonstrated evidence of pneumoconiosis.

Mr. McAngues can walk one block and a half but he is tired and short of breath by the time he walks that distance and he has to do so slowly. He sleeps with one pillow. He sleeps on his back but he finds it difficult to breath on his back. He is under the care of Dr. Tacker of Dillonville, (Martins Ferry Hospital). His activity has been limited to helping with some odd jobs around the house. He has a riding tractor which he uses to mow the lawn. He used to do some gardening but now does very little. The hemiparesis of the right side seems to have lessened and stabilized. There has been little change since 5 years after the accident. He walks with a limp. He climbs the hill, he leads with his left side. He does the same thing going up and down steps.

The medical history includes a T&A in childhood. There has been no other serious illnesses. He had been a ¾ pack per day smoker about 15 years. He stopped in 1969 or 1970. There is no family history of pulmonary disease. His mother developed high blood pressure and diabetes. There have been no heart related problems with which Mr. McAngues is aware.

On physical examination, Mr. McAngues blood pressure is 138/80 in the right arm and 134/84 in the left arm. His respirations are 20 at rest and his pulse was 88. He walks with a definite limp tending to drag the right foot with the foot inverted, drawn so that it seems to be slightly shorter than the left leg. Examination of

the ears is normal. The pupils are equal and react normally. Fundiscopic examination demonstrates some areas of black pigmentations near the optic discs in both eyes. The areas are not definitely infarcted. Discs are sharp. Perinasal sinuses transilluminate adequately. The nasal septum deflects moderately and the turbinates are hyperplastic and somewhat hyperitic. An upper partial is present and some lower molars are absent. The neck is supple. The carotids are normal. The neck veins are slightly full in the supine position but there is no reflex filling. Chest is symmetrical with an increased AP diameter. The chest circumference is 102 sonometers on exhalation and 104 sonometers on inhalation in a low position and have about a 4 to 4½ cm excursion. They are symmetrical. There is a generalized definite decrease in breath sounds throughout the lung fields and there are diffuse sonorous and scattered sibilant expiratory rhonchi with some snores inspiratory rhonchi present. No rattles are heard. A2 and P2 are moderately prominent and about equal. The PMI is at the MCL. No murmurs or gallops are heard. Abdominal examination demonstrates no organ enlargement, masses, tenderness or bruits. Exam of the extremities demonstrates a moderate degree of paralysis in the right lower extremity with hyperactive knee jerks. There is obvious weakness on flexion and extension at the knee with some weakness at the hip noted on hip movement. Movement of the hands and arms are relatively normal. Ear to nose finger to finger movements are within normal limits. No clubbing or edema is noted. Ventilatory studies demonstrate a FEV_1 of 1.61 liters with a maximum voluntary ventilation recorded at 36 liters. The forced vital capacity was 2.64 liters. The EKG was within normal limits. The PO2 is 74.8 with the PCO2 of 30.7. The PH is 7.445. This is at room air. Chest x-ray demonstrates evidence of fine nodular densities in both lungs, most probably on the basis of pneumoconiosis.

Thus, Mr. McAngues has developed simple coal workers pneumoconiosis in association with the severe chronic obstructive pulmonary disease. Obviously, the coal workers pneumoconiosis is consequence of his prolonged coal mine exposure. Based on the studies and the history and the examination, it is my opinion that Mr. McAngues is disabled regarding gainful coal mine employment.

Sincerely,

/s/ Jon Tipton
JON P. TIPTON, M.D.

JPT/bc

FEDERAL COAL MINE HEALTH AND SAFETY ACT OF 1969

TITLE IV

30 USC § 901 et seq.

(As amended by the Black Lung Benefits Act of 1972)

AN ACT To provide for the protection of the health and safety of persons working in the coal mining industry of the United States, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Federal Coal Mine Health and Safety Act of 1969".

* * * *

TITLE IV—BLACK LUNG BENEFITS *

PART A—GENERAL

SEC. 401. Congress finds and declares that there are a significant number of coal miners living today who are totally disabled due to pneumoconiosis arising out of employment in one or more of the Nation's coal mines; that there are a number of survivors of coal miners whose deaths were due to this disease *or who were totally disabled by this disease at the time of their deaths*; and that few States provide benefits for death or disability due to this disease to coal miners or their surviving dependents. It is, therefore, the purpose of this title to provide benefits, in cooperation with the States, to coal miners who are totally disabled due to pneumoconiosis and to the surviving dependent of miners whose death was due to such disease *or who were totally disabled by this disease at the time of their deaths*; and to ensure that

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*** Amendments made by Black Lung Benefits Act of 1972 shown in italic type.**

in the future adequate benefits are provided to coal miners and their dependents in the event of their death or total disability dueto pneumoconiosis.

SEC. 402. For purposes of this title—

(a) *The term "dependent" means—*

(1) a child as defined in subsection (g) without regard to subparagraph (2)(B)(ii) thereof; or

(2) a wife who is a member of the same household as the miner, or is receiving regular contributions from the miner for her support, or whose husband is a miner who has been ordered by a court to contribute to her support, or who meets the requirements of section 216(b)(1) or (2) of the Social Security Act. The determination of an individual's status as the "wife" of a miner shall be made in accordance with section 216(h)(1) of the Social Security Act as if such miner were the "insured individual" referred to therein. The term "wife" also includes a "divorced wife" as defined in section 216 (d)(1) of the Social Security Act who is receiving at least one-half of her support, as determined in accordance with regulations perscribed by the Secretary, from the miner, or is receiving substantial contributions from the miner (pursuant to a written agreement), or there is in effect a court order for substantial contributions to her support from such miner.

(b) The term "pneumoconiosis" means a chronic dust disease of the lung arising out of employment in a coal mine.

(c) The term "Secretary" where used in part B means the Secretary of Health, Education, and Welfare, and where used in part C means the Secretary of Labor.

(d) The term "miner" means any individual who is or was employed in a coal mine.

(e) The term "widow" includes the wife living with or dependent for support on the miner at the itme of his death, or living apart from reasonable cause or because of his desertion, or who meets the requirements of section 216(c), (1), (2), (3), (4), or (5), and section 216(k) of the Social Security Act, who is not married. The determination of an individual's status as the "widow" of a miner shall be made in accordance with section 216(h) (1) of the Social Security Act as if such miner were the "insured individual" referred to therein. Such term also includes a "surviving divorced wife" as defined in section 216(d)(2) of the Social Security Act who for the month preceding the month in which the miner died, was receiving at least one-half of her support, as determined in accordance with regulations prescribed by the Secretary, from the miner, or was receiving substantial contributions from the miner (pursuant to a written agreement) or there was in effect a court order for substantial contributions to her support from the miner at the time of his death.

(f) The term "total disability" has the meaning given it by regulation of the Secretary of Health, Education, and Welfare, except that such regulations shall provide that a miner shall be considered totally disabled when pneumoconiosis prevents him from engaging in gainful employment requiring the skills and abilities comparable to those of any employment in a mine or mines in which he previously engaged with some regularity and over a substantial period of time. Such regulations shall not provide more restrictive criteria than those applicable under section 223(d) of the Social Security Act.

(g) The term "child" means a child or a step-child who is—

(1) unmarried; and

(2)(A) under eighteen years of age, or

(B)(i) under a disability as defined in section 223 (d) of the Social Security Act,

(ii) which began before the age specified in section 202(d)(1)(B)(ii) of the Social Security Act, or, in the case of a student, before he ceased to be a student; or

(C) a student.

The term "student" means a "full-time student" as defined in section 202(d)(7) of the Social Security Act, or a "student" as defined in section 8101(17) of title 5, United States Code. The determination of an individual's status as the "child" of the miner or widow, as the case may be, shall be made in accordance with section 216(h)(2) or (3) of the Social Security Act as if such miner or widow were the "insured individual" referred to therein.

BLACK LUNG BENEFITS REFORM ACT OF 1977
PUBLIC LAW 95-239—MARCH 1, 1978

30 U.S.C. § 902(f)

SHORT TITLE

SECTION 1. *This Act may be cited as the "Black Lung Benefits Reform Act of 1977".*

DEFINITIONS

SEC. 2. *(a) Section 402(b) of the Federal Mine Safety and Health Act of 1977 (hereinafter in this Act referred to as the "Act") is amended to read as follows:*

"(b) The term 'pneumoconiosis' means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment.".

(b) Section 402(d) of the Act is amended to read as follows:

"(d) The term 'miner' means any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal. Such term also includes an individual who works or has worked in coal mine construction or transportation in or around a coal mine, to the extent such individual was exposed to coal dust as a result of such employment.".

(c) Section 402(f) of the Act as amended to read as follows:

"(f)(1) The term 'total disability' has the meaning given it by regulations of the Secretary of Health, Education, and Welfare for claims under part B of this title, and by regulations of the Secretary of Labor for claims under part C of this title, subject to the relevant provisions of subsections (b) and (d) of section 413, except that—

"(A) in the case of a living miner, such regulations shall provide that a miner shall be considered totally disabled when pneumoconiosis prevents him or her from engaging in gainful employment requiring the skills and abilities comparable to those of any employment in a mine or mines in which he or she previously engaged with some regularity and over a substantial period of time;

"(B) such regulations shall provide that (i) a deceased miner's employment in a mine at the itme of death shall not be used as conclusive evidence that the miner was not totally disabled; and (ii) in the case of a living miner, if there are changed circumstances of employment indicative of reduced ability to perform his or her usual coal mine work, such miner's employment in a mine shall not be used as conclusive evidence that the miner is not totally disabled;

"(C) such regulations shall not provide more restrictive criteria than those applicable under section 223(d) of the Social Security Act; and

"(D) the Secretary of Labor, in consultation with the Director of the National Institute for Occupational Safety and Health, shall establish criteria for all appropriate medical tests under this subsection which accurately reflect total disability in coal miners as defined in subparagraph (A).

"(2) Criteria applied by the Secretary of Labor in the case of—

"(A) any claim which is subject to review by the Secretary of Health, Education, and Welfare, or subject to a determination by the Secretary of Labor, under section 435(a);

"(B) any claim which is subject to review by the Secretary of Labor under section 435(b); and

"(C) any claim filed on or before the effective date of regulations promulgated under this subsection by the Secretary of Labor;

shall not be more restrictive than the criteria applicable to a claim filed on June 30, 1973, whether or not the final disposition of any such claim occurs after the date of such promulgation of regulations by the Secretary of Labor.".

Section 411(c) of the Act 30 USC 921(c)(5)

(5) In the case of a miner who dies on or before the date of the enactment of the Black Lung Benefits Reform Act of 1977 who was employed for 25 years or more in one or more coal mines before June 30, 1971, the eligible survivors of such miner shall be entitled to the payment of benefits, at the rate applicable under section 412(a)(2), unless it is established that at the time of his or her death, such miner was not partially or totally disabled due to pneumoconiosis. Eligible survivors shall, upon request by the Secretary, furnish such evidence as available with respect to the health of the miner at the time of his or her death.

20 C.F.R. § 410.412 "Total disability" defined.

(a) A miner shall be considered totally disabled due to pneumoconiosis if:

(1) His pneumoconiosis prevents him from engaging in gainful work in the immediate area of his residence requiring the skills and abilities comparable to those of any work in a mine or mines in which he previously engaged with some regularity and over a substantial period of time (that is, "comparable and gainful work"; see §§ 410.424-410.426); and

(2) His impairment can be expected to result in death, or has lasted or can be expected to last for a continuous period of not less than 12 months.

(b) A miner shall be considered to have been totally disabled due to pneumoconiosis at the time of his death, if at the time of his death:

(1) His pneumoconiosis prevented him from engaging in gainful work in the immediate area of his residence requiring the skills and abilities comparable to those of any work in a mine or mines in which he previously engaged with some regularity and over a substantial period of time (that is, "comparable and gainful work"; see §§ 410.424-410.426; and

(2) His impairment was expected to result in death, or it lasted or was expected to last for a continuous period of not less than 12 months.

20 CFR § 727.203

§ 727.203 Interim presumption.

(a) *Establishing interim presumption.* A miner who engaged in coal mine employment for at least 10 years will be presumed to be totally disabled due to pneumoconiosis, or to have been totally disabled due to pneumoconiosis at the time of death, or death will be presumed to be due to pneumoconiosis, arising out of that employment, if one of the following medical requirements is met:

(1) A chest roentgenogram (X-ray), biopsy, or autopsy establishes the existence of pneumoconiosis (see § 410.428 of this title);

(2) Ventilatory studies establish the presence of a chronic respiratory or pulmonary disease (which meets the requirements for duration in § 410.412(a)(2) of this title) as demonstrated by values which are equal to or less than the values specified in the following table:

	Equal to or less than—	
	FEV_1	MVV
67″ or less	2.3	92
68″	2.4	96
69″	2.4	96
70″	2.5	100
71″	2.6	104
72″	2.6	104
73″ or more	2.7	106

(3) Blood gas studies which demonstrate the presence of an impairment in the transfer of oxygen from the lung alveoli to the blood as indicated by values which are equal to or less than the values specified in the following table:

Arterial pCO_1	Arterial pO_2 equal to or less than (mm Mg)
30 or below	70
31	69
32	68
33	67
34	66
35	65
36	64
37	63
38	62
39	61
40-45	60
Above 45	Any Value

(4) Other medical evidence, including the documented opinion of a physician, exercising reasoned medical judgment, establishes the presence of a totally disabling respiratory or pulmonary impairment;

(5) In the case of a deceased miner where no medical evidence is available, the affidavit of the survivor of such minor or other persons with knowledge of the miner's physical condition, demonstrates the presence of a totally disabling respiratory or pulmonary impairment.

(b) *Rebuttal of interim presumption.* In adjudicating a claim under this subpart, all relevant medical evidence shall be considered. The presumption in paragraph (a) of this section shall be rebutted if:

(1) The evidence establishes that the individual is, in fact, doing his usual coal mine work or comparable and gainful work (see § 410.412(a)(1) of this title); or

(2) In light of all relevant evidence it is established that the individual is able to do his usual coal mine work or comparable and gainful work (see § 410.412(a)(1) of this title); or

(3) The evidence establishes that the total disability or death of the miner did not arise in whole or in part out of coal mine employment; or

(4) The evidence establishes that the miner does not, or did not, have pneumoconiosis.

(c) *Applicability of Part 718.* Except as is otherwise provided in this section, the provisions of Part 718 of this subchapter as amended from time to time, shall also be applicable to the adjudication of claims under this section.

(d) *Failure of miner to qualify under the presumption in paragraph (a) of this section.* Where eligibility is not established under this section, such eligibility may be established under part 718 of this subchapter as amended from time to time.

20 CFR § 410.426

§ 410.426 Determining total disability: Age, education, and work experience criteria.

(a) Pneumoconiosis which constitutes neither an impairment listed in the appendix to this subpart, (see § 410.424), nor the medical equivalent thereof, shall nevertheles be found totally disabling if because of the sevirity of such impairment, the miner is (or was) not only unable to do his previous coal mine work, but also cannot (or could not), considering his age, his education, and work experience, engage in any other kind of comparable and gainful work (see § 410.412(a)(1)) available to him in the immediate area of his residence. A miner shall be determined to be under a disability only if his pneumoconiosis is (or was) the primary reason for his inability to engage in such comparable and gainful work. Medical impairments other than pneumoconiosis may not be considered.

The following criteria recognize that an impairment in the transfer of oxygen from the lung alveoli to cellular level can exist in an individual even though his chest roentgenogram (X-ray) or ventilatory function tests are normal.

(b) Subject to the limitations in paragraph (a) of this section, pneumoconoisis shall be found disabling if it is established that the miner has (or had) a respiratory impairment because of pneumoconiosis demonstrated on the basis of a ventilatory study in which the maximum voluntary ventilation (MVV) or maximum breathing capacity (MBC), and 1-second forced expiratory volume (FEV), are equal to or less than the values specified in the following table or by a medically equivalent test:

Height (inches)	MVV (MBC) equal to or less than	and	FEV_1 equal to or less than
	L./Min.		L.
57 or less	52		1.4
58	53		1.4
59	54		1.4
60	55		1.5
61	56		1.5
62	57		1.5
63	58		1.5
64	59		1.6
65	60		1.6
66	61		1.6
67	62		1.7
68	63		1.7
69	64		1.8
70	65		1.8
71	66		1.8
72	67		1.9
73 or more	68		1.9

(c) Where the values specified in paragraph (b) of this section are not met, pneumoconiosis may nevertheless be found disabling if a physical performance test establishes a chronic respiratory or pulmonary impairment which is medically the equivalent of the values specified in the table in paragraph (b) of this section. Any decision with respect to such medical equivalence shall be based on medically accepted clinical and laboratory diagnostic techniques including a medical judgment furnished by one or more physicians designated by the Administration.

(d) Where a ventilatory study and/or a physical performance test is medically contraindicated, or cannot be obtained, or where evidence obtained as a result of such tests does not establish that the miner is totally disabled, pneumoconiosis may nevertheless be found totally disabling if other relevant evidence (see § 410.414(c)) establishes that the miner has (or had) a chronic respiratory or pulmonary impairment, the severity of which prevents (or prevented) him not only from doing his previous coal mine work, but also, considering his age, his education, and work experience, prevents (or prevented) him from engaging in comparable and gainful work.

(e) When used in this section, the term "age" refers to chronological age and the extent to which it affects the miner's capacity to engage in comparable and gainful work.

(f) When used in this section, the term "education" is used in the following sense: Education and training are factors in determining the employment capacity of a miner. Lack of formal schooling, however, is not necessarily proof that a miner is an uneducated person. The kinds of responsibilities with which he was charged when working may indicate ability to do more than unskilled work even though his formal education has been limited.

§ 718.202 Determining the existence of pneumoconiosis.

(a) A finding of the existence of pneumoconiosis may be made as follows:

(1) A chest X-ray conducted and classified in accordance with § 718.102 may form the basis for a finding of the existence of pneumoconiosis. Except as otherwise provided in this section, where two or more X-ray reports are in conflict, in evaluating such X-ray reports consideration shall be given to the radiological qualifications of the physicians interpreting such X-rays.

(i) In all claims filed before January 1, 1982, where there is other evidence of pulmonary or respiratory impairment, a Board-certified or Board-eligible radiologist's interpretation of a chest X-ray shall be accepted by the Office if the X-ray is in compliance with the requirements of § 718.102 and if such X-ray has been taken by a radiologist or qualified radiologic technologist or technician and there is no evidence that the claim has been fraudulently represented. However, these limitations shall not apply to any claim filed on or after January 1, 1982.

(ii) The following definitions shall apply when making a finding in accordance with this paragraph.

(A) The term *other evidence* means medical tests such as blood-gas studies, pulmonary function studies or physicial examinations or medical histories which establish the presence of a chronic pulmonary, respiratory or cardio-pulmonary condition, and in the case of a deceased miner, in the absence of medical evidence to the contrary, affidavits of persons with knowledge of the miner's physicial condition.

(B) *Pulmonary or respiratory impairment* means inability of the human respiratory apparatus to perform in a normal manner one or more of the three components of respiration, namely, ventilation, perfusion and diffusion.

(C) *Board-certified* means certification in radiology or diagnostic roentgenology by the American Board of Radiology, Inc. or the American Osteopathic Association.

(D) *Board-eligible* means the successful completion of a formal accredited residency program in radiology or diagnostic roentgenology.

(E) *Certified 'B' reader or 'B' reader* means a physician who has demonstrated proficiency in evaluating chest roentgenograms for roentgenographic quality and in the use of the ILO-U/C classification for interpreting chest roentgenograms for pneumoconiosis and other diseases by taking and passing a specially designed proficiency examination given on behalf of or by the Appalachian Laboratory for Occupational Safety and Health. See 42 CFR 37.51(b)(2).

(F) *Qualified radiologic technologist or technician* means an individual who is either certified as a registered technologist by the American Registry of Radiologic Technologists or licensed as a radiologic technologist by a state licensing board.

(2) A biopsy or autopsy conducted and reported in compliance with § 718.106 may be the basis for a finding of the existence of pneumoconiosis. A finding in an autopsy of anthracotic pigmentation, however, shall not be sufficient, by itself, to establish the existence of pneumoconiosis. A report of autopsy shall be accepted unless there is evidence that the report is not accurate or that the claim has been fraudulently represented.

(3) If the presumptions described in §§ 718.304, 718.305 or § 718.306 are applicable, it shall be presumed that the miner is or was suffering from pneumoconiosis.

(4) A determination of the existence of pneumoconiosis may also be made if a physician, exercising sound medical judgment, notwithstanding a negative X-ray, finds that the miner suffers or suffered from pneumoconiosis as defined in § 718.201. Any such finding shall

be based on objective medical evidence such as blood-gas studies, electrocardiograms, pulmonary function studies, physical performance tests, physical examination, and medical and work histories. Such a finding shall be supported by a reasoned medical opinion.

(b) No claim for benefits shall be denied solely on the basis of a negative chest X-ray.

(c) A determination of the existence of pneumoconiosis shall not be made solely on the basis of a living miner's statements or testimony. Nor shall such a determination be made upon a claim involving a deceased miner filed on or after January 1, 1982, solely based upon the affidavit(s) (or equivalent sworn testimony) of the claimant and or his or her dependents who would be eligible for augmentation of the claimant's benefits if the claim were approved.

[45 FR 13678, Feb. 29, 1980, as amended at 48 FR 24288, May 31, 1983]

§ 718.203 Establishing relationship of pneumoconiosis to coal mine employment.

(a) In order for a claimant to be found eligible for benefits under the Act, it must be determined that the miner's pneumoconiosis arose at least in part out of coal mine employment. The provisions in this section set forth the criteria to be applied in making such a determination.

(b) If a miner who is suffering or suffered from pneumoconiosis was employed for ten years or more in one or more coal mines, there shall be a rebuttable presumption that the pneumoconiosis arose out of such employment.

(c) If a miner who is suffering or suffered from pneumoconiosis was employed less than ten years in the nation's coal mines, it shall be determined that such

pneumoconiosis arose out of that employment only if competent evidence establishes such a relationship.

§ 718.204 Total disability defined; criteria for determining total disability.

(a) *General.* Benefits are provided under the Act for or on behalf of miners who are totally disabled due to pneumoconiosis, or who were totally disabled due to pneumoconiosis at the time of death. The standards of this section shall be applied to determine whether a miner is or was "totally disabled" for the purpose of the Act.

(b) *Total disability defined.* A miner shall be considered totally disabled if the irrebuttable presumption in § 718.304 applies. If the irrebuttable presumption described in § 718.304 does not apply, a miner shall be considered totally disabled if pneumoconiosis as defined in § 718.201 prevents or prevented the miner:

(1) From performing his or her usual coal mine work; and

(2) From engaging in gainful employment in the immediate area of his or her residence requiring the skills or abilities comparable to those of any employment in a mine or mines in which he or she previously engaged with some regularity over a substantial period of time.

(c) *Criteria.* In the absence of contrary probative evidence, evidence which meets the standards of either paragraphs (c)(1), (2), (3), (4) or (5) of this section shall establish a miner's total disability:

(1) Pulmonary function tests showing values equal to or less than those listed in Table B1 (Males) or Table B2 (Females) in appendix B to this part for an individual of the miner's age, sex, and height for the FEV, test; if, in addition, such tests also reveal the values specified in either paragraph (c)(1) (i) or (ii) or (iii) of this section:

(i) Values equal to or less than those listed in Table B3 (Males) or Table B4 (Females) in appendix B of this part, for an individual of the miner's age, sex, and height for the FVC test, or

(ii) Values equal to or less than those listed in Table B5 (Males) or Table B6 (Females) in appendix B to this part, for an individual of the miner's age, sex, and height for the MVV test, or

(iii) A percentage of 55 or less when the results of the FEV_1 test are divided by the results of the FVC test (FEV_1/FVC equal to or less than 55%), or

(2) Arterial blood-gas tests show the values listed in Appendix C to this part, or

(3) The miner has pneumoconiosis and has been shown by the medical evidence to be suffering from cor pulmonale with right sided congestive heart failure, or

(4) Where total disability cannot be established under paragraphs (c)(1), (c)(2) or (c)(3) of this section, or where pulmonary function tests and or blood-gas studies are medically contraindicated, total disability may nevertheless be found if a physician exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents or prevented the miner from engaging in employment as described in paragraph (b) of this section, or

(5) In a case involving a deceased miner in which the claim was filed prior to January 1, 1982, where there is no medical or other relevant evidence, affidavits (or equivalent sworn testimony) from persons knowledgeable of the miner's physical condition shall be sufficient to establish total (or under § 718.306 partial) disability. On a survivor's claim filed on or after January 1, 1982, but prior to June 30, 1982, where entitlement is sought to be established in accordance with § 718.306, where there is no medical or other relevant evidence, affidavits

(or equivalent sworn testimony) from persons knowledgeable of the miner's physical condition shall be sufficient to establish total or partial disability; however, such a determination shall not be based solely upon the affidavits or testimony of the claimant and or his or her dependents who would be eligible for augmentation of the claimant's benefits if the claim were approved. Except as provided in § 718.305, proof that the miner suffers or suffered from a totally disabling respiratory or pulmonary impairment as defined in paragraphs (c)(1), (2), (4) and (5) of this section shall not, by itself, be sufficient to establish that the miner's impairment is or was due to pneumoconiosis.

(d) In determining total disability, the following shall apply to statements made by miners about their condition:

(1) Statements made before death by a deceased miner about his or her physical condition are relevant and shall be considered in making a determination as to whether the miner was totally disabled at the time of death.

(2) In the case of a living miner's claim, a finding of total disability shall not be made solely on the miner's statements or testimony.

(e) In determining total disability to perform usual coal mine work, the following shall apply in evaluating the miner's employment activities:

(1) In the case of a deceased miner, employment in a mine at the time of death shall not be conclusive evidence that the miner was not totally disabled. To disprove total disability, it must be shown that at the time the miner died, there were no changed circumstances of employment indicative of his or her reduced ability to perform his or her usual coal mine work.

(2) In the case of a living miner, proof of current employment in a coal mine shall not be conclusive evidence that the miner is not totally disabled unless it can

be shown that there are no changed circumstances of employment indicative of his or her reduced ability to perform his or her usual coal mine work.

(3) Changed circumstances of employment indicative of a miner's reduced ability to perform his or her usual coal mine work may include but are not limited to:

(i) The miner's reduced ability to perform his or her customary duties without help; or

(ii) The miner's reduced ability to perform his or her customary duties at his or her usual levels or rapidity, continuity or efficiency; or

(iii) The miner's transfer by request or assignment to less vigorous duties or to duties in a less dusty part of the mine.

(f) No miner who is engaged in coal mine employment shall (except as provided in § 718.304) be entitled to any benefit under this part while so employed. Any miner who has been determined to be eligible for benefits shall be entitled to benefits only if the miner's employment terminates within one year after the date such determination becomes final.

[45 FR 13678, Feb. 29, 1980, as amended at 48 FR 24288, May 31, 1983]

EXCERPT FROM DR. KRESS DEPOSITION

* * * *

[26] Q. And could you tell us what that diagnosis was please?

A. I thought he had early simple coal workers' pneumoconiosis without any demonstrable evidence of impairment, and of course, the residual paralysis secondary to his prior brain injury in an auto accident.

Q. Okay. Now, Doctor, I'm going to ask you some questions to a reasonable degree of medical certainty. To a reasonable degree of medical certainty, does this Claimant have coal workers' pneumoconiosis or any other significant pulmonary or respiratory disease?

A. Yes, I feel that he does.

Q. All right. And to a reasonable degree of medical certainty, would you have an opinion as to whether or not this Claimant is totally disabled due to coal workers' pneumoconiosis or any pulmonary or respiratory disease?

A. Yes, I would have an opinion.

Q. And what is that opinion, Doctor?

A. It would be that he is not based upon all of the objective findings that I have available.

Q. All right. Doctor, if this Claimant has any [27] disability, does that disability arise in whole or in part from coal mine employment?

A. No.

Q. Okay. Doctor, in relation to his present pulmonary and respiratory condition, and by present I mean as of the time that you examined this man, would this Claimant be able to do his usual coal mine work or comparable and gainful work as you understood it?

A. Considering only his respiratory system I think that he had no impairment and therefore he was capable of any type of work.

Q. Now, Doctor, your diagnosis in this matter, is it based more on any one particular finding than any other particular finding?

A. No. Well, I should say I think the diagnosis of simple pneumoconiosis in essence is based on what I see on X-ray plus his history of exposure.

Q. Okay.

A. That's the only supporting evidence, I mean, for that.

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